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General Accounting Office

94

Potential Problem With Federal Tax System Postemployment Conflicts Of Interest Can Be Prevented

In the U.S. tax system, the Departments of Justice and the Treasury, including the Internal Revenue Service, have done little to administer post-Federal employment restrictions which are designed to prevent potential conflicts of interest.

Hundreds of Government tax attorneys and accountants may have entered private practice without being adequately informed of these restrictions on their future activities in tax matters, and Justice, Treasury, and IRS have not taken enough action to prevent postemployment conflicts of interest.

The agencies need to (1) inform employees of the restrictions before they leave Government service, (2) develop postemployment manuals which contain the information that former employees need to comply with the restrictions, (3) determine and establish the level of enforcement needed to reasonably ensure that the restrictions are not violated, and (4) enforce compliance.

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SEPTEMBER 15, 1981

I

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II

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

GENERAL GOVERNMENT
DIVISION

B-197223

To the Attorney General and
the Secretary of the Treasury

This report discusses how the Departments of Justice and the Treasury, including the Internal Revenue Service, implement the postemployment laws and professional standards that apply to former Federal employees. We made this review because Government tax attorneys and accountants who enter private tax practice could become involved in problems concerning conflict-of-interest situations. The report points out that the Justice and Treasury Departments need to fully inform employees of the postemployment restrictions before they leave Government service and take steps to assure that former employees are complying with them.

This report makes recommendations to you on pp. 19 and 36. Section 236 of the Legislative Reorganization Act of 1970 requires the head of a Federal agency to submit a written statement on actions taken on our recommendations to the Senate Committee on Governmental Affairs and the House Committee on Government Operations not later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the report.

Copies of this report are being sent to the Commissioner of Internal Revenue; Director, Office of Management and Budget; Director, Office of Government Ethics; and the Chairmen, House Committees on Government Operations and Ways and Means, Senate Committees on Governmental Affairs and Finance, House and Senate Committees on Appropriations and the Judiciary, and Joint Committee on Taxation.

Sincerely yours,

W. J. Anderson

William J. Anderson
Director

III

REPORT TO THE ATTORNEY GENERAL AND THE SECRETARY OF THE TREASURY

POTENTIAL PROBLEM WITH FEDERAL TAX SYSTEM POSTEMPLOYMENT CONFLICTS OF INTEREST CAN BE PREVENTED

D I G E S T

A large potential problem with conflicts of interest in the Federal tax system exists and the Departments of Justice and the Treasury have not been sufficiently concerned.

These Departments, including the Internal Revenue Service (IRS), employ thousands of tax attorneys and accountants who, if they enter private tax practice, are subject to postemployment restrictions. These restrictions are included in Federal conflict-of-interest statutes, agency regulations and professional codes of ethics. They are designed to prevent the conflicts of interest that could occur if former Federal employees used confidential Government information and influenced former Government colleagues to the advantage of a private client and to the detriment of the Government. (See p. 2.)

GAO received questionnaire responses from 71 former employees, who were subsequently involved in Federal tax matters, which indicated that 60 had not been given the information by their former agency that they needed to comply with the postemployment restrictions in effect when they left the Government. Although the number of former tax administration employees working in private tax practice is not known, GAO's analysis of Justice and Treasury personnel records indicates that hundreds of tax administration employees have left for private sector jobs.

To prevent postemployment conflicts of interest from becoming a serious problem in the tax system, the Justice and Treasury Departments need to

--make sure that employees entering private tax practice have the information that they need to determine if their participation in a tax matter would violate the postemployment restrictions and

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--make detection and punishment of postemployment violations a realistic possibility in order to encourage compliance.

In addition, the Justice and the Treasury Departments should develop uniform policies for enforcing the postemployment restrictions that apply to the associates of former employees.

FORMER EMPLOYEES NEED BETTER POSTEMPLOYMENT INFORMATION

Violations of the postemployment restrictions could occur in the tax system simply because former employees are not aware of or do not understand the restrictions on their postemployment participation in tax matters. The Justice and Treasury Departments do not always adequately inform their employees of the restrictions at employee conduct seminars or at the time an employee leaves the Government. Instead, the agencies expect their employees to learn of the restrictions on their own. These employees, therefore, must seek this information from various sources, none of which contains all of the information that they need. (See p. 11.)

A GAO questionnaire showed that of the 83 former employees who responded, 71, or 86 percent, were involved in Federal tax matters. Of the 71 former employees, 31, or 44 percent, noted that they had not been informed of postemployment restrictions. An additional 29 former employees did not receive complete information on the restrictions from their former agencies. Many of the former employees receiving information responded that it would not help them to determine if their participation in a tax matter would violate a restriction. (See pp. 14 and 16.)

POSTEMPLOYMENT RESTRICTIONS NEED TO BE ENFORCED

Justice and the Treasury, including IRS, do not know how many former employees are working in private tax practice. They do not monitor their former employees' subsequent involvement in Federal tax matters either to detect violations of the restrictions or to determine if postemployment problems exist.

Thus, the agencies do not know if there have been many occasions where former employees faced postemployment conflict-of-interest situations because of their prior Government responsibilities. They also do not know if these situations are being resolved or if they are resulting in violations of the postemployment restrictions. (See p. 23.)

During a 33-month period, GAO found that well over 400 Government tax attorneys and accountants left these positions to take private sector jobs. GAO's questionnaire results from employees who left those positions in fiscal year 1978 show that the number working in private sector tax jobs and facing conflict-of-interest situations is great enough to require that compliance with the postemployment restrictions be monitored to reasonably ensure that violations are detected. (See p. 26.)

Equally important is that, once they are detected, violators should be disciplined in accordance with the postemployment conflict-of-interest statute and regulations. The Ethics in Government Act of 1978 authorized the agencies to administratively discipline these violators.

Although a system for disciplining the Treasury Department's postemployment tax regulation violators has been in place for years, few suspected postemployment violations have been processed through the system. The various Treasury Department offices with such enforcement responsibilities have not coordinated their activities or exchanged information. As a result, (1) possible violations of the postemployment restrictions have not been referred to Treasury's Director of Practice for administrative action and (2) potential conflict-of-interest situations which have been identified have not been followed up ensure compliance with the restrictions. (See p. 26.)

POSTEMPLOYMENT RESTRICTIONS THAT APPLY TO FORMER EMPLOYEES' ASSOCIATES SHOULD BE ENFORCED UNIFORMLY

When a former employee cannot participate in a tax matter because of a postemployment

restriction, his or her associates also are disqualified from the matter because the appearance of a conflict of interest could result. The associates, however, can avoid disqualification by isolating the former employee from the matter involved.

Justice and Treasury do not administer this isolation requirement in the same manner. Justice requires that certain minimum procedures be followed to isolate the former employee, while Treasury permits the associates to participate in the matter, regardless of the isolation procedures followed. On the other hand, the Justice Department has not issued regulations similar to the Treasury Department's, which disqualify former employees' associates from matters in which the former employee had been involved during negotiations for employment, a situation which Treasury believes creates the appearance of a conflict-of-interest.

The differences in the way the isolation requirement is enforced in the tax system could result in the associates of a former employee being permitted to participate in a matter in one part of the system while their participation in the same matter would be prohibited in another part of the system. (See p. 31.)

OFFICE OF GOVERNMENT ETHICS HAS ISSUED FINAL REGULATIONS

The Office of Government Ethics has issued final regulations requiring that agencies establish education and counseling programs which cover postemployment matters, take prompt and effective administrative actions to remedy actual or potential violations of the conflict-of-interest statutes, and periodically evaluate the adequacy and effectiveness of their postemployment enforcement systems. Prompt and effective implementation of these regulations could prevent the development of postemployment problems in the tax system. (See p. 8.)

RECOMMENDATIONS

To comply with the Office of Government Ethics' regulations and to make sure that tax administration employees entering private practice have the information that they need to comply

with the post-Federal employment restrictions, the Attorney General and the Secretary of the Treasury should

--require separating employees to certify that they have read, understand, and will comply with the restrictions and

--develop a postemployment manual that former employees could consult to determine if their participation in a tax matter would violate a postemployment restriction. (See p. 19.)

Also, the Attorney General and the Secretary of the Treasury should develop better information on the scope of the postemployment conflicts-of-interest problem. On the basis of this information they should determine, establish, and periodically review the level of enforcement needed to reasonably ensure compliance with postemployment restrictions.

In addition, the Secretary of the Treasury should establish procedures for coordinating the enforcement of the postemployment restrictions in the Department so that violators of the restrictions are disciplined. The Secretary and the Attorney General should develop uniform policies for enforcing the restrictions that affect former employees' associates so that the former employees and their associates will be treated uniformly in the tax system. (See p. 36.)

AGENCY COMMENTS AND GAO'S EVALUATION

Justice and Treasury indicated that they would implement some of GAO's recommendations as part of the ethics programs they are developing in response to the Office of Government Ethics' regulations. The Office of Government Ethics agrees with the recommendations that it would be useful to counsel with and provide more specific information to separating employees. Justice and Treasury did not, however, agree to implement all of the recommendations for informing employees and enforcing the restrictions. The agencies' reasons for not implementing specific recommendations and GAO's evaluation of their reasons are discussed in detail in this report. (See pp. 9, 20, and 37.)

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In general, the agencies disagreed with GAO because they contend that the report does not come to grips with the critical question of whether postemployment violations are a serious problem. Justice, Treasury, and the Office of Government Ethics believe that the extent to which the restrictions are being violated should be documented before the agencies take a more active role in enforcing the restrictions.

In addition, Treasury believes that GAO relied too heavily on a questionable statistical survey. It also believes that the report fails to recognize its efforts to educate employees, its methods for identifying conflict-of-interest situations, its enforcement systems' effectiveness, and the personal ethical responsibility of tax practitioners.

Justice and Treasury agreed with GAO's recommendations to develop uniform regulations regarding the restrictions that apply to former employees' associates. Treasury suggested that since this matter is not unique to the tax system, the Office of Government Ethics may want to develop a coordinated approach to apply Government-wide.

GAO agrees that the extent of the postemployment problem needs to be determined. However, it found that the agencies do not maintain the records needed to either identify postemployment violations or randomly sample former employees so that the results can be projected to the universe of former employees working in the tax system. Nevertheless, the results of GAO's limited survey, together with its own analysis of the agencies' postemployment programs, demonstrates that the potential for former Government tax attorneys and accountants to face conflict situations is great. The agencies need to find out what types of conflict situations their former employees are facing and how frequently these situations occur so that they can decide on the methods needed to assure compliance with the restrictions. (See pp. 9 and 39.)

GAO did not fail to recognize Treasury's efforts relating to postemployment matters. On the contrary, its review indicated that Treasury's

efforts to educate its employees have been inadequate, Treasury's system for identifying violators of the restrictions is not reliable for all types of conflict situations, and Treasury's enforcement system has not been used to process suspected postemployment violations which have been identified. (See pp. 15, 24, and 27.)

Finally, Treasury suggests that GAO is questioning former employees' personal ethics. This is not true. What GAO is questioning is the extent to which the agencies are fulfilling their obligation to help employees meet their ethical responsibilities by ensuring that they are aware of and understand the postemployment restrictions before they leave the Government.

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ABBREVIATIONS

ABA	American Bar Association
GAO	General Accounting Office
IRS	Internal Revenue Service
OGE	Office of Government Ethics

CHAPTER I

INTRODUCTION

The Departments of Justice and the Treasury, including the Internal Revenue Service (IRS), employ about 1,200 attorneys and 15,000 accountants 1/ in carrying out their responsibilities for administering the Federal tax laws. One of the reasons the agencies are able to recruit talented and qualified persons is that these tax administration jobs provide unique opportunities to develop expert knowledge of tax laws and procedures. After a few years of Government service, many of these employees take jobs with private law and accounting firms. A problem may arise, however, because those employees who join firms which advise and represent clients on Federal tax-related matters can face potential conflict-of-interest situations.

Although post-Federal employment conflicts of interest can take many forms, they generally occur when former employees represent the interests of private clients before their former agencies or the courts in matters related to their prior Government responsibilities. These conflicts of interest stem from the opportunity to use Government information and contacts to the advantage of a private client. Federal conflict-of-interest statutes, agency regulations, and codes of professional responsibility place restrictions on former employees' postemployment activities which prohibit them from participating in certain situations in which these opportunities could occur or appear to occur.

The extent to which former Federal employees comply with these postemployment restrictions is important. The movement of Federal employees from Government to related private sector jobs has been a public issue for several years. The conflicts of interest, or the appearance of conflicts of interest, that this movement creates has a negative effect on public confidence in the honesty and fairness of Government operations.

We have reported on post-Federal employment conflict-of-interest problems at other agencies and have noted that postemployment restrictions enforcement receives a low priority

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1/These accountants are IRS revenue agents who are required to have accounting backgrounds. IRS may employ many other accountants in other positions, such as revenue officers and tax auditors, although accounting backgrounds are not required for these positions.

until adverse publicity occurs. 1/ Postemployment conflict-of-interest problems in the tax system could jeopardize voluntary compliance with the tax laws. Voluntary compliance depends on public trust and confidence in the fairness by which the tax laws are administered. If the public believed that former Government tax attorneys and accountants were using information or influence gained through Government service to benefit their clients, it would question the fairness of the system. The possibility of postemployment problems eroding voluntary compliance can be minimized through effective implementation of the post-Federal employment restrictions within the tax system.

THE POST-FEDERAL EMPLOYMENT RESTRICTIONS

The statutory postemployment conflict-of-interest restrictions define four situations in which former Federal employees may not participate. Since the statute is applicable Government-wide, these restrictions establish the minimum standards which control former tax administration employees' participation in tax matters pending at the Federal agencies and the courts. The Treasury Department's regulations governing the practice of attorneys, certified public accountants, and enrolled agents 2/ before IRS, encompass the statutory restrictions and define additional situations which could result in conflicts of interest if former tax administration employees participate in matters at IRS. Finally, the American Bar Association's (ABA) Code of Professional Responsibility contains its own definition of the conflicts of interest that can occur when former Federal attorneys subsequently participate in Government matters.

The restrictions and their applicability in the tax system are discussed on the following pages. (See apps. IV, V, and VI for texts of the restrictions.)

Government-wide restrictions imposed by statute

The postemployment conflict-of-interest statute, 18 U.S.C. 207, was enacted in 1962 and amended by the Ethics in Government

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1/"What Rules Should Apply To Post-Federal Employment and How Should They Be Enforced?" (FPCD-78-38, Aug. 28, 1978); "Employee Standards of Conduct: Improvements Needed in the Army and Air Force Exchange Service and the Navy Resale System Office" (FPCD-79-15, Apr. 24, 1979); and "National Science Foundation Conflict of Interest Problems with Grants to Short Term Employees" (PAD-81-16, Jan. 15, 1981).

2/Enrolled agents are persons who have demonstrated to IRS a special competence in tax matters and are granted enrollment to practice before IRS.

Act of 1978. It contains four basic restrictions which affect former tax administration employees who represent clients in tax matters or cases pending at any Federal department, agency, or court. Two of the restrictions apply to all former tax administration employees:

--18 U.S.C. 207(a) permanently bars former employees from acting as another person's representative to the Government in a particular matter which they had participated in personally and substantially as a Government employee.

--18 U.S.C. 207(b)(i) prohibits, for 2 years, former employees from acting as another person's representative to the Government in a particular matter which they had official responsibility for as a Government employee within their last year of service.

The other two restrictions, which were added by the Ethics Act, apply to former "senior" tax administration employees, generally defined as GS-17s and above who have substantial decisionmaking authority or who are in the Senior Executive Service:

--18 U.S.C. 207(b)(ii) prohibits senior employees, for 2 years, from assisting in representing another person by personal presence at an appearance in the same matter or case that they had participated in personally and substantially as a Government employee.

--18 U.S.C. 207(c) prohibits senior employees, for 1 year, from appearing before their former agency in an attempt to influence a decision or action on any matter of interest to the agency.

Former employees who violate the postemployment statute may be fined up to $10,000, imprisoned for 2 years, or both. Violators also may be barred from practice before or contact with their former agency for up to 5 years.

Restrictions applicable to practice at IRS

In addition to the Government-wide restrictions imposed by statute, former tax administration employees who work on matters pending at IRS are subject to restrictions established by Treasury Department regulations which augment those imposed by statute.

First, section (c) of the statute, which affects only senior employees, covers matters of a general nature, whereas the other sections apply only to "particular matters involving specific parties." Under the regulations that apply at IRS, however, any former employee who was involved in the development of a Treasury

regulation, Treasury decision, revenue ruling, or revenue procedure may not (1) appear, for 1 year, before a Treasury employee in connection with the adoption, change, or withdrawal of that rule or (2) use or disclose any confidential information acquired in the development of the rule or contend that the rule is invalid or illegal when representing clients in the interpretation or application of the rule.

Second, the statutory restrictions apply only to the former employee, while the Treasury regulations apply to the former employee's partners and associates unless the former employee is isolated from any participation in the matter, i.e., screened from directly and/or indirectly assisting in the representation. There are, however, certain conditions under which isolation is not acceptable. These conditions are discussed on page 33.

Former employees and their associates who violate these postemployment regulations may be suspended or disbarred from practice before IRS.

Restrictions applicable to former Government attorneys

Former Government tax attorneys who represent clients in tax cases are also subject to ABA's Code of Professional Responsibility. The code provides that:

--A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

--If a lawyer is required to decline or withdraw from employment under the code, no partner, or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment.

ABA Formal Opinion 342, however, permits a former Government attorney's associates to participate in matters that the former employee had substantial responsibility for if the former employee is effectively isolated from participating in the matter and sharing in the fees attributable to it and if the agency approves the isolation procedures and is satisfied that there is no appearance of significant impropriety affecting the interests of the Government.

The ABA Code does not prescribe penalties for violations. If a lawyer violates the code, the courts can take disciplinary actions, such as censuring, suspending, or disbarring the violator. ABA's Special Committee on Evaluation of Disciplinary Enforcement can recommend the disciplinary measures to the courts.

RESPONSIBILITIES FOR ADMINISTERING THE POSTEMPLOYMENT RESTRICTIONS

The Office of Government Ethics (OGE), within the Office of Personnel Management, provides policy guidance and general direction to the Federal departments and agencies which are responsible for administering the postemployment statute with respect to their particular functions. The Department of Justice is responsible for criminal enforcement of the statute. The Public Integrity Section of the Justice Department's Criminal Division reviews referred cases and recommends whether the cases should be prosecuted by the Department's U.S. attorneys.

The individual agencies' responsibilities involve

--informing employees of the postemployment restrictions,

--developing regulations which address specific postemployment problems within the context of the agency's operations,

--providing postemployment counseling and advice on specific problems, and

--enforcing the restrictions administratively.

The offices which are to carry out these responsibilities in connection with tax matters are shown in the table on the next page.

The primary responsibility for administering the ABA Code rests with the courts. Judges can insist that attorneys participating in cases before them adhere to the code's provisions. Usually, this would occur after the Government attorney involved in the case moves that the opposing counsel be disqualified from the case because of a conflict of interest. Thus, IRS' Chief Counsel's Office, which represents the Government in cases before the Tax Court, and the Justice Department's Tax Division, which represents the Government in tax cases before other courts, are instrumental in administering the code's postemployment provisions in the tax system.

OBJECTIVES, SCOPE, AND METHODOLOGY

We evaluated the administration of the post-Federal employment restrictions by the Justice and Treasury Departments, including IRS, to determine if their controls were adequate to prevent, identify, and remedy conflicts of interest in the Federal tax system. We focused on the potential for postemployment problems to occur, but we did not investigate the activities of former employees to identify violations of the restrictions.

	Distribute information	Develop regulations	Counsel and advise employees	Investigate cases	Discipline violators
Responsible for administering the postemployment statute					
Government-wide:					
Office of Government Ethics		X	X		
Department of Justice				X	X
Agency:					
Department of Justice:					
Justice Management Division	X				
Office of Legal Counsel		X	X		
Criminal Division				X	X
Department of the Treasury:					
Office of Personnel (note a)	X	X			
General Counsel (note a)		X	X		
Inspector General (note b)				X	
Director of Practice					X
Responsible for administering the Treasury regulations at the Internal Revenue Service					
IRS Personnel Division	X				
IRS Internal Security Division (note b)				X	
Treasury Department's					
IRS Chief Counsel			X		
Director of Practice		X	X		X

a/IRS' Personnel Division and Chief Counsel perform these functions at IRS.

b/Cases involving former IRS employees may be investigated by the Treasury Department's Inspector General or IRS' Internal Security Division.

We conducted our review at the Justice Department, Treasury Department, and IRS national offices in Washington, D.C.; and at the IRS regional and district offices in Chicago, Illinois. We

--interviewed responsible agency officials and reviewed agency policies, regulations, procedures, and practices for administering the postemployment restrictions;

--reviewed the case files which were closed during fiscal years 1978 and 1979 for all investigations of potential violations of the postemployment restrictions by former tax administration employees;

--reviewed all of the agencies' opinions documented during fiscal years 1978 and 1979 on whether a former tax administration employee's participation in a matter would violate a postemployment restriction;

--developed separation statistics for the period January 1, 1976, through September 30, 1978, from agency personnel records for Justice Department, Tax Division and IRS Chief Counsel attorney positions; Treasury Department, Office of Tax Policy attorney positions; and selected IRS attorney, tax law specialist, and revenue agent positions; and

--mailed questionnaires to individuals who left these positions during fiscal year 1978 for private sector employment which we thought might involve work related to Federal tax matters.

As of September 30, 1978, there were 1,893 employees in the positions reviewed and 656 separations during the period covered. Of the 656 employees who left, 433, or 66 percent, left for private sector jobs which could have been tax related (see app. X). We attempted to send questionnaires to 160 of the 433 employees. These 160 employees represented all of the employees who left during fiscal year 1978 for whom we could obtain addresses.

We limited the positions covered in our review because of the time required to develop employee separation statistics from the personnel records. We chose positions which we believed involved responsibilities conducive to postemployment conflicts of interest and which were likely to be filled by persons who did not intend to make public service a career. Also, we chose the IRS Chicago District Office tax law specialist and revenue agent positions because the attrition rates for that office and those positions were among the highest in IRS. Thus, the separation statistics in this report relate only to the positions covered and not to all tax administration positions. (See p. 25 and app. VII.)

Similarly, we limited the number of questionnaires sent because of difficulties in obtaining the current addresses of former employees. Therefore, the questionnaire results tabulated in this report cannot be projected to all former employees.

Our methodology for selecting the positions and for selecting the former employees who were sent questionnaires is explained in more detail in appendix VII.

During our review, the Congress amended the postemployment conflict-of-interest statute. The revised restrictions became effective on July 1, 1979, and thus did not apply to the former employees whom we contacted. However, the information in this report reflects changes made to the agencies' administration of the postemployment restrictions through November 1980.

In January 1981 OGE published final regulations concerning Federal agencies' implementation of the conflict-of-interest statutes. The regulations require that agencies establish ethics programs which, among other things, will ensure that (1) education and counseling programs covering postemployment matters are conducted, (2) lists of situations which may result in noncompliance are available internally and to the public, (3) administrative action is taken to remedy and follow up on actual or potential violations, (4) agency regulations and enforcement systems are periodically evaluated for adequacy and effectiveness, and (5) internal audit and investigative information is reviewed to determine if corrective action is needed in potential conflict-of-interest situations.

The problems noted in this report support the need for prompt and effective implementation of these regulations in the tax system. Our recommendations are within the context of the regulations and should help the agencies comply with them.

AGENCY COMMENTS AND OUR EVALUATION

The Assistant Attorney General for Administration; the Acting General Counsel, Treasury Department; and the Director, OGE, commented on a draft of this report. Treasury's comments included those of IRS.

Treasury and OGE indicated that it is neither unanticipated nor undesirable that former employees use their tax expertise in the private sector. They pointed out that the agencies' ability to recruit qualified personnel is enhanced by this tendency.

All of the agencies criticized our report for not determining the extent to which the postemployment restrictions are being violated and, thus, not coming to grips with the critical question of whether conflicts of interest are a serious problem.

OGE also said that if the report had concentrated on the degree to which actual violations have taken place, the agencies would have had a greater rationale for allocating additional resources to their postemployment programs. It suggested that it would have steered us toward some type of measurement of the seriousness of the problem.

Treasury believes that our report relies too heavily on a questionable statistical survey and does not fully appreciate the personal responsibility of sophisticated tax practitioners to conduct themselves in an ethical manner with an awareness of all appropriate restrictions.

OGE commented that our survey involved former employees who left Government service before the revised statutory restrictions took effect.

We agree with Treasury and OGE that benefits accrue to the Government when its employees move to private tax practice. This movement, however, is not the subject of this report and nothing in the report is intended to affect it. Instead, this report deals with weaknesses in the agencies' programs to inform employees of the postemployment restrictions and enforce the restrictions in the tax system.

We did not attempt to measure the extent of actual postemployment restriction violations because of the agencies' present recordkeeping systems. The agencies do not maintain centralized records that relate employees with the tax cases on which they had worked or personnel records which indicate the postemployment jobs of former employees. We decided that it would be impossible to research a representative number of individual tax cases to obtain the names of the employees who had worked on the case and then determine if such employees had left the Government and they or their new associates were working on the case.

The agencies' personnel records also affected our ability to conduct a projectable survey of former employees because the records do not provide information on the individual's current employment and location. Although the results of our survey cannot be projected to the universe of employees who have left the agencies, the results, together with our analysis of the agencies' postemployment programs, prove that conflict-of-interest problems can occur. Moreover, we do not believe that the revisions to the statute affected our survey results as OGE suggested. The major revisions applied only to senior employees and our survey focused on individuals of a lower level.

Under the above conditions a postaudit cannot determine the extent of the problem. Therefore, we are recommending, in chapter 3, that the agencies take responsibility for obtaining some measure of what we have demonstrated could be a potentially serious problem.

Finally, Treasury suggests that we are questioning former employees' personal ethical responsibility. This is not true. What we are questioning is the extent to which the Department is fulfilling its obligation to help employees meet their ethical responsibilities by ensuring that they are aware of and understand the postemployment restrictions before they leave the Government.

CHAPTER 2

TAX ADMINISTRATION EMPLOYEES NEED BETTER INFORMATION TO COMPLY WITH THE POSTEMPLOYMENT RESTRICTIONS

Compliance with the post-Federal employment tax system restrictions can be difficult because the restrictions that apply under various circumstances are complex and because difficult judgments are required to apply the restrictions in specific situations. Violations of the restrictions could occur if former tax administration employees are unaware of or do not understand the restrictions on their postemployment participation in tax matters.

The majority of the 71 former employees who noted on our questionnaire that they were involved in Federal tax work also noted that they had not received information from their former agencies on the restrictions that applied at the Federal organizations that their postemployment tax work involved. Moreover, many of those receiving information did not find it useful for determining if their participation in a tax matter would violate a restriction.

Unless the Justice and Treasury Departments make sure that their tax administration employees have the information that they need to comply with the restrictions, postemployment conflicts of interest could become a problem in the tax system. The agencies need to increase employee awareness of the postemployment restrictions so that employees know if their postemployment involvement in tax matters is affected by different restrictions. The agencies also need to develop a postemployment manual for their former employees. These persons could use the manual as a reference to help them identify the tax matters or cases on which they and/or their associates may not work because a restriction would be violated.

POSTEMPLOYMENT RESTRICTIONS ARE COMPLEX AND CAN BE DIFFICULT TO APPLY IN SPECIFIC SITUATIONS

The postemployment restrictions are complex and difficult to apply for two reasons. First, the question of whether a former employee can participate in a matter, as well as the type of postemployment activity prohibited and the length of the restrictions, varies by

--the former employee's Government position, e.g., whether he/she was a senior or lower level employee;

--the type of matter involved, e.g., whether it was a particular matter involving specific parties or a more general one involving policies or rules; and

--the extent of the former employee's Government involvement in the matter, e.g., whether the former employee personally and substantially participated in the matter or had official responsibility for it.

For example, under the postemployment statute, former senior employees may not represent clients in either specific cases or general rulemaking matters that had been pending at their agencies when they left. This restriction, which lasts for a year, applies regardless of whether the former senior employee had had any type of involvement in the matter. If the matter was a general one, the former senior employee could represent the client in it after the year had passed. If the matter was a specific case involving specific parties and it had been within the former employee's official responsibilities, the restriction against representing the client would last an additional year. If, however, the former employee had been substantially involved in the specific case, the restriction would be permanent.

Also, there are differences in the restrictions imposed by the statute, Treasury regulations, and the ABA Code. For example, under the statute and the ABA Code, former employees below the senior level are permitted to represent clients in rulemaking matters that they had been involved in as soon as they leave the Government. They are not permitted such representations for a year after they leave Government under the Treasury regulations however.

Other differences exist with respect to the type of postemployment activity prohibited and the extent of the former employee's participation in the matter. For example, the statute permits former employees to aid and counsel clients in matters in which actual contact with the Government would be prohibited, whereas the Treasury regulations and ABA Code do not permit such assistance. Also, the ABA Code provides that the former employee must have had "substantial responsibility" for the matter, which could involve more than the official responsibility but less than the personal and substantial participation provisions of the statute and the Treasury regulations.

Former employees who practice in the tax system need to be familiar with these differences in the restrictions because their postemployment participation in a tax matter may be permitted or prohibited depending on which Federal organization the matter is pending before at a certain point in time. For example, a former Treasury Office of Tax Policy or IRS employee who had worked on a proposed revenue ruling could be prohibited from representing a client concerning the proposed ruling at IRS; however, the same

employee could be permitted to represent the client concerning the same ruling at the Office of Tax Policy since this restriction is imposed by the Treasury regulations which only apply at IRS. Or a former employee who had official responsibility for a matter may be permitted to represent a client in the matter at IRS 2 years after he or she had left but may be permanently barred from representing the client if the nature of the responsibility fell within the meaning of substantial responsibility under the ABA Code.

The second reason that the postemployment restrictions are complex and difficult to apply concerns specific situations. Although participation in some situations would obviously violate a restriction, other situations are not as clear.

For example, the statute, Treasury regulations, and ABA Code prohibit a former employee from representing another person in a tax matter that the employee had participated in while with the Government. Clearly, a Government attorney who prepared a tax case for litigation may not later represent the taxpayer in that case in the courts. But could this former Government attorney represent the same taxpayer in the same tax issues for different tax years? Or could another former employee, who sat in on a meeting at which the strengths and weaknesses of the Government's case had been discussed, represent the taxpayer?

Answers to questions such as these require difficult judgments, such as whether the matter is the same as the one the former employee had participated in and whether that participation was personal and substantial. They also require judgments based on the policies underlying the restrictions, such as whether the former employee has confidential information about the matter that could be used against the Government or whether the former employee's participation in the matter would appear improper even though an actual violation of a restriction may not occur.

FORMER EMPLOYEES MAY NOT BE RECEIVING INFORMATION NEEDED TO COMPLY WITH THE POSTEMPLOYMENT RESTRICTIONS

In our questionnaire, we asked former employees about their employment after leaving the Government and about the postemployment information given to them by their former agencies. The majority of the 83 former employees who responded said they had not been given the information that they would need to determine if their participation in a tax matter would violate a postemployment restriction. (Our questionnaire methodology and results are discussed in apps. VII and IX.)

About 44 percent of the 71 former employees involved in Federal tax-related work said their agencies had not informed them of postemployment restrictions which could affect their postemployment participation in tax matters. An additional 41 percent said their agencies did not give them complete information on the restrictions. Also, less than half of the former employees who had received some postemployment information thought that the information given to them would be helpful in determining if the restrictions applied in potential conflict-of-interest situations.

We did not try to determine if these former employees had violated the postemployment restrictions. However, on the basis of our questionnaire results, we did determine that the agencies had not given their employees adequate postemployment information and thus inadvertent violations could occur. The agencies should make sure that their employees are aware of the restrictions on post-Federal employment in tax matters before they leave Government service and should give their employees a manual which contains the information that former employees need to comply with the restrictions.

Agencies do not adequately or uniformly notify employees of the restrictions that apply in the tax system

The amount of information that tax administration employees receive on the restrictions that apply in the tax system before they leave Government service depends on the employee. The majority of the former employees who responded to our questionnaire were practicing in the tax system but had not received information on the postemployment restrictions which could affect them.

Of the 83 former employees who responded to our questionnaire, 71, or 86 percent, were involved in Federal tax-related work. Of those 71 former employees, 31, or 44 percent, had not received any information on the postemployment restrictions from their former agencies.

In addition, 29 of the 71 former employees, or 41 percent, had received some postemployment information but had not been informed of all of the restrictions that they needed to be aware of in light of their postemployment activities. For example, former tax administration employees representing parties before IRS would need to be aware of the postemployment statute and the regulations governing practice before IRS to avoid violating a restriction. Of the 56 respondents to our questionnaire who said that they represented parties before IRS, 22 had not received any postemployment information and 15 others had not been informed of the statute and/or the IRS restrictions.

Although the Justice and Treasury Departments, including IRS, expect their employees to comply with the postemployment restrictions if they enter private tax practice, the agencies' efforts to inform their employees of the restrictions before they leave Government service have been minimal and inconsistent among the agencies.

Overall, all the agencies give new employees information on the postemployment statute in their employee conduct regulations, which the employees are expected to read and understand. Beyond this, however, agencies provide varying amounts of information. For example, the Justice Department's Tax Division mentions the restrictions at an annual ethics seminar that it holds for newly employed attorneys and periodically redistributes its conduct regulations. The Treasury Department does not hold such seminars for its Office of Tax Policy or IRS Chief Counsel employees and does not redistribute its conduct regulations unless changes are made. IRS requires its employees to attend annual conduct seminars and redistributes its conduct regulations annually. However, IRS National Office officials told us that the postemployment restrictions are mentioned but are not emphasized at these seminars. IRS Chicago District Office officials, on the other hand, told us that the postemployment restrictions are not mentioned at the seminars held in that district.

In addition, the amount of information provided when the employees leave varies by agency. The Justice Department's Tax Division gives separating employees a summary of the statute which indicates that they are responsible for reviewing the restrictions. The Treasury Department's Office of Tax Policy does not have procedures for notifying employees of the postemployment restrictions when they leave. IRS does have an exit requirement which serves to notify IRS and Chief Counsel employees of the postemployment statute. Separating employees and their supervisors are required to certify that the employee has read Treasury's and IRS' conduct regulations, which refer to the statute on a "Separating Employee Clearance" form. This form is used to ensure that the employee had returned Government property or repaid money before final salary payment is made. The form, however, does not refer to the other restrictions that apply in the tax system.

We discussed the certification requirement with three group managers from the Examination Division at IRS' Chicago District Office. One of the managers said that he discusses the conflict-of-interest provisions with employees before they leave. The other two group managers said that they merely rely on the employee's certification that the provisions have been read and understood.

In 1976 the IRS Chief Counsel's Advisory Committee on Rules of Professional Conduct recommended that these certification

requirements be revised. It did this so that employees entering private tax practice would also be required to certify that they were aware of the Treasury Department's postemployment regulations and that they would call the regulations to the attention of their new associates to ensure that the restrictions would be observed. In addition, the Committee recommended that IRS' power of attorney form, which is required in order to represent a taxpayer at IRS, be revised so that every tax practitioner executing it would be aware that they were subject to the postemployment restrictions. The Committee's recommendations have not been implemented.

Available postemployment information is inadequate

Our questionnaire also indicated that the former employees who had been informed of the postemployment restrictions did not receive the information that they need to determine if their participation in a tax matter would violate a postemployment restriction. The majority of the 44 former employees who had received some postemployment information thought that the information was adequate. However, their opinion was less favorable when they considered the information in relation to potential conflict-of-interest situations. Less than half of the respondents thought that the information would be very or somewhat helpful in determining if

--the same tax matter was involved,

--their Government participation in the matter was personal and substantial,

--the matter had been within their official Government responsibilities,

--any type of postemployment participation in the matter would be permissible,

--they could participate in the same matter before another agency or the courts, and

--their associates could participate in matters from which they themselves were disqualified.

Furthermore, the former employees who indicated that they had experienced potential conflicts of interest because of their Government participation in or responsibility for a matter were for the most part dissatisfied with the postemployment information that they had received. Of the 71 former employees who were involved in Federal tax-related matters, 15, or 21 percent, indicated that they had faced a potential postemployment conflict-of-interest situation because of their Government responsibilities.

Of those 15, 11 had received postemployment information. Of the 11, only 4 indicated the information was generally to very adequate. Only two of these former employees had asked their former agency's opinion on the potential conflict-of-interest situation. The others resolved the conflict situation independently.

The postemployment information available to former tax administration employees is summarized in the table on the following page. As the table indicates, there is no single reference source that former employees can consult which states all of the postemployment restrictions that apply in the tax system or which provides information relevant to compliance with the restrictions.

For example, the agencies' conduct regulations state that employees are responsible for compliance with the conduct regulations overall but do not specifically state their responsibilities with respect to the postemployment restrictions, e.g., that former employees are responsible for recognizing and disqualifying themselves from participating in the matters to which the restrictions apply. Nor do the regulations instruct former employees to request advice or opinions from their agencies when postemployment questions arise.

Thus, former IRS employees, for instance, would have to consult both the Internal Revenue Manual and the regulations governing practice at IRS in order to obtain information on the restrictions that apply at IRS and the criminal and administrative penalties for violating them. If former employees wanted an explanation of the statutory restrictions, they would have to consult the Office of Government Ethics' regulations. These regulations explain the restrictions by giving definitions and examples of postemployment activities which are permitted and prohibited. They do not, however, explain how the statutory restrictions affect postemployment participation in tax matters and, used alone, could be misleading to former tax administration employees because some postemployment activities that are permitted under the law are prohibited by the other restrictions that apply in the tax system. For example, the regulations state that former Federal employees are permitted to represent private interests in the rulemaking process even though they may have had a role in that process. In contrast, the restrictions that apply at IRS prohibit such representations for 1 year after the employee leaves Government service.

SOURCES OF INFORMATION ON THE POSTEMPLOYMENT RESTRICTIONS

Source	Restriction imposed by: Statute	Restriction imposed by: Treasury regulations	Restriction imposed by: ABA code	Information provided: Purpose of restrictions	Information provided: Responsibilities for compliance	Information provided: Penalties for violations	Information provided: Explanation of restriction	Information provided: Agency advice or opinions
Office of Government Ethics:								
Postemployment conflict-of-interest regulations (5 CFR 737)	Yes	NA	NA	Yes	Yes	Yes	Yes	Yes
Department of Justice:								
Standards of conduct (28 CFR 45)	Yes	No	a/No	No	No	No	No	No
Department of the Treasury:								
Standards of conduct (5 CFR 735)	Yes	No	No	No	No	No	No	No
Internal Revenue Manual (section 300)	Yes	No	No	Yes	No	Yes	No	No
Regulations governing practice before IRS (TD Circular No. 230)	b/Yes	Yes	No	No	No	c/Yes	No	No

a/States that Justice Department employees are subject to the code but does not mention the provisions which affect former employees.

b/Refers to the law but does not state the restrictions.

c/Does not state the penalties for violating the law.

BEST DOCUMENT AVAILABLE

CONCLUSIONS

Although the post-Federal employment restrictions are complex and can be difficult to interpret in individual situations, the Justice and Treasury Departments, including IRS, have done little to help tax administration employees who enter private practice comply with the restrictions. The responses to our questionnaire indicate that former tax administration employees could unwittingly participate in conflict-of-interest situations because

--they either had not been informed of the restrictions that apply in different parts of the tax system, or

--the postemployment information available to them would not help them to determine if their involvement in a particular tax matter would violate a restriction.

The agencies do not always notify their employees of the postemployment restrictions that apply in the tax system. Generally the agencies expect their employees to learn of the different restrictions on their own from various publications. As a result, 44 percent of the former employees that we contacted said that they did not receive any information from their agencies on the postemployment restrictions before they left Government service. Many others had not been informed of all of the restrictions that could affect their postemployment participation in tax matters.

The agencies can increase employee awareness of the postemployment restrictions by making several easy changes. The Justice and the Treasury Departments should adopt IRS' requirement that separating employees certify that they have read the postemployment restrictions and IRS should expand its requirement to include all of the restrictions that apply in the tax system. IRS also should emphasize the postemployment restrictions during its employee conduct seminars and should revise the power of attorney form used by tax practictioners to refer to the restrictions.

In addition, the agencies could help former employees comply with the restrictions by developing a postemployment manual that contains information on all of the restrictions that apply in the tax system. Over 20 percent of the former employees we contacted who work in the tax system had faced potential conflict-of-interest situations. However, none of the information sources available to them contained adequate information on the restrictions.

RECOMMENDATIONS

We recommend that the Attorney General and the Secretary of the Treasury:

--Require separating employees to certify, in the presence of their supervisors, that they have read, understand, and will comply with the postemployment statute, the regulations governing practice before IRS, and the legal profession's code pertaining to former Federal employees.

--Develop a postemployment manual which (a) states the postemployment restrictions that apply to former Federal employees who practice in the tax system, the purpose of the restrictions, the former employee's responsibilities for complying with the restrictions, and the penalties for violating the restrictions, (b) explains how the restrictions apply to the functions performed by tax administration employees, and (c) instructs former employees to direct questions about the restrictions and their applicability to their agencies' ethics counselors.

We also recommend that the Secretary direct the Commissioner of Internal Revenue to (1) emphasize the postemployment restrictions at seminars during which employee conduct is discussed and (2) revise the power of attorney form used at IRS to state that the person executing the form is aware of the postemployment restrictions applicable to former tax administration employees and their associates.

AGENCY COMMENTS AND OUR EVALUATION

The Justice and Treasury Departments, including IRS, indicated that they are developing ethics programs to implement OGE's regulations. Justice said that its comments on our recommendations are subject to reconsideration in conjunction with the development of its program. OGE concurred with the report's recommendations that it would be useful to counsel terminating employees and provide them more specific information.

Justice disagreed with our recommendation that it adopt a certification procedure for separating employees. Justice believed that the certification would not affect compliance and employees would find it offensive. However, it will consider requiring separating employees to acknowledge receipt of postemployment materials.

Treasury discussed in detail the certification required of Chief Counsel and IRS employees. It also said that attorneys leaving the Chief Counsel's office are given an order on postemployment conflict-of-interest prohibitions which states the statute and Treasury regulations. It, however, did not say if the certification requirement would be expanded to include the regulations in addition to the statute or if it would be extended to Tax Policy employees.

Regarding our recommendation that a postemployment manual be developed, Justice commented that it is not necessary or desirable to prepare separate materials for each area of law. It thinks that examples of the statute's application in litigation settings covering different types of cases would be more valuable and less burdensome and cumbersome. It is willing to work with Treasury and IRS in preparing interpretative guides.

Treasury said that it is preparing a handbook containing relevant postemployment material for distribution to all employees. It did not say if postemployment matters would be given more emphasis during IRS' conduct seminars as we recommended. It did, however, say that the power of attorney form is being revised to include notice of postemployment statute and regulations and criminal penalties.

Treasury criticized our report for failing to recognize its considerable efforts to educate present and former employees concerning the postemployment restrictions. It discussed in length the postemployment information given to employees. In addition, it said that high-level officials have been fully apprised of the statutory restrictions applicable to them through briefing and counseling sessions and that Chief Counsel and IRS employees were furnished copies of information on the revised statute.

We believe that Justice's suggestion that separating employees acknowledge receipt of the postemployment information would establish a control for assuring that they have been given the information. It, however, would not emphasize the employees' responsibility for understanding the restrictions and complying with them, something that the recommended certification procedure would do. Also, since the certification is already required of Chief Counsel and IRS employees, we doubt that many individuals would find it offensive. Therefore, we believe that Justice should implement the certification requirement.

We also believe that Treasury's certification procedures should be expanded to include its postemployment regulations. Although the Chief Counsel order that Treasury referred to mentions both the statute and the regulations, it is given only to separating Chief Counsel employees and not to all employees who could be affected by the restrictions. Furthermore, the order is seriously out-of-date in that it has not been revised to include the 1977 restrictions that pertain to rulemaking situations and to the associates of former employees. Former employees using this information in good faith could inadvertently violate one of the newer restrictions. The certification procedure should also be extended to Tax Policy employees.

We agree with Justice that separate manuals for each area of law are not necessary as long as the planned manual adequately covers information included in our recommendation.

We do not agree with Treasury that its efforts to educate employees have been adequate. Most of the postemployment information discussed in detail in Treasury's comments was already summarized on pages 14 thru 18 of this report. Our review showed that former employees were not obtaining adequate postemployment information from these sources. For example, the questionnaire respondents who said that they had not received information on the statute are probably unaware that Treasury intended that they get information on the statute from the employee conduct manuals that they periodically received.

Treasury's efforts to inform employees of the revised postemployment statute are a step in the right direction. However, these efforts have not corrected two basic problems. First, Treasury has not consolidated material on the statute and regulations in a single document. Second, Treasury does not distribute all of the material to all employees who could be affected by the restrictions. It is difficult for employees to know what is expected of them when they leave Government service because the agencies' practices in providing postemployment information have not been consistent. Greater uniformity could be easily achieved by combining material on the statute and regulation in a single postemployment manual and calling attention to the manual through approaches such as IRS' employee conduct seminars and the certification procedures required at separation.

CHAPTER 3

AGENCIES NEED TO DO MORE TO ENFORCE THE POSTEMPLOYMENT RESTRICTIONS IN THE TAX SYSTEM

Because the postemployment statute had not been enforced through the use of criminal prosecutions, the 1978 Ethics in Government Act authorized agency-administered systems and penalties for disciplining conflict-of-interest statute violators. The purpose of this authorization was to provide a realistic possibility that violators of the statute would be punished, thereby encouraging former Federal employees to (1) comply with the statute and (2) exercise more caution in their postemployment dealings with their former agencies.

However, agency enforcement of the statutory restrictions is unlikely for two reasons. First, the Justice and Treasury Departments, including IRS, do not monitor compliance with the restrictions and, thus, lack a reliable means for detecting violations. Second, the Treasury Department has not used the administrative penalties authorized by the regulations governing practice before IRS to enforce the postemployment restrictions. The basic reason for this lack of use is that the various offices within the Treasury Department which are responsible for enforcing the postemployment restrictions have not coordinated their activities or exchanged information.

In addition to doing little to enforce the postemployment statute, the Justice and Treasury Departments have not been uniformly enforcing the agency-imposed restrictions that apply to the associates of former employees.

MECHANISMS FOR DETECTING POSTEMPLOYMENT VIOLATIONS HAVE NOT BEEN ESTABLISHED

The Ethics in Government Act assigns Federal agencies the responsibility for administrative enforcement of the postemployment statute but does not require that the agencies establish systems for monitoring compliance with the statute. For example, agencies are not required to collect information on the postemployment activities of former employees or on their former employees' subsequent appearances before the agencies. Some Federal agencies, however, have taken the initiative to establish such systems.

The Department of Defense, for example, has a reporting system which requires certain former employees who go to work for specific contractors to file employment reports. The Federal Trade Commission has a clearance and waiver system which requires former employees who wish to work on a matter that was pending before the Commission during their employment to file a clearance

statement with and obtain a waiver from the Commission. The Securities and Exchange Commission has a notification system which requires former employees who wish to appear before the Commission to notify it of such intent.

Officials at the Justice and Treasury Departments, including IRS, believe that such monitoring systems are unnecessary in the tax system because few violations of the postemployment restrictions have come to their attention. Yet, because the agencies have not monitored compliance with the restrictions, they have no assurance that if there are violations, they are being detected.

The results of the questionnaire that we sent to former tax administration employees indicate that postemployment conflicts of interest could be more of a problem than the agencies recognize. A significant percentage of the former employees contacted had faced potential conflict-of-interest situations. These former employees had received little or no information from their former agencies to help them determine if their or their associates' participation in the situation would violate a restriction. Therefore, there is a distinct possibility that unwitting violations of the restrictions could occur.

Although our questionnaire was sent to a limited number of former employees, our analysis of the agencies' personnel records indicates that turnover in tax administration positions conducive to postemployment conflicts of interest is great. Most of the employees who leave these positions take private sector jobs which may involve Federal tax matters. Monitoring systems need to be established to provide a reasonable degree of assurance that violations of the restrictions will be detected.

Agencies do not monitor compliance with the postemployment restrictions

The Justice and Treasury Departments, including IRS, do not monitor the activities of their former employees to ensure that they are complying with the postemployment restrictions. Instead, the agencies rely on their (1) former employees to recognize when their participation in a tax matter would violate a restriction and to disqualify themselves from participation in that matter and (2) current employees to detect violations of the restrictions that occur and report them to the appropriate officials.

This practice has some merit in that it does not involve the costs and paperwork usually associated with monitoring systems. However, its reliability is questionable because of the following.

First, its effectiveness depends on both former and current employees' familiarity with the restrictions, but the agencies

have done little to bring the postemployment restrictions to the attention of their employees. Second, its effectiveness also depends on the current employees' knowledge of the former employees' private employment since the restrictions extend to the former employees' associates. Finally, information is not generated which would alert the agencies to postemployment problems or potential problems. For example, the agencies do not know if there are many former employees working in the tax system, if there have been many occasions where former employees faced potential conflicts of interest because of their former Government responsibilities, or if conflict-of-interest situations are being resolved or are resulting in violations of the restrictions.

Postemployment problems may be greater than the agencies realize

The extent to which controls should be imposed to monitor postemployment conflicts of interest in the tax system depends largely on the number of former employees who are affected by the restrictions. To be affected, employees have to leave their Government positions for private sector jobs which involve Federal tax-related matters and then have an opportunity to participate in a matter that had been within their area of responsibility as a Government employee.

To determine if many former employees are affected by the restrictions, we developed separation statistics for the Justice, Treasury, and IRS positions which we thought were susceptible to postemployment conflicts of interest because they involve the types of tax matters covered by the restrictions. The specific tax administration positions covered by our review are listed in appendix VIII. In summary they include:

--Attorneys employed in the Justice Department's Tax Division to review IRS recommendations for civil or criminal prosecution of tax cases and represent IRS in tax cases before the U.S. District, Claims, Appeals, and Supreme Courts.

--Attorneys employed in the Treasury Department's Office of Tax Policy to formulate tax policy, negotiate international tax treaties, and develop revenue rulings and tax regulations which interpret how the tax laws are to be applied.

--Attorneys employed in Treasury's IRS Chief Counsel's Office to represent IRS in tax cases before the Tax Court and advise IRS employees on tax interpretations, regulations, and procedures.

--Tax law specialists who may be either attorneys or accountants employed in IRS' Technical Division to apply the

Internal Revenue Code to specific factual circumstances in the form of private letter rulings for taxpayers and technical advice for IRS agents.

--Revenue agents employed by IRS to audit the books of individual and corporate taxpayers to determine correct Federal tax liabilities.

We reviewed the agencies' personnel records for these positions and found that 656 employees left during the 33-month period from January 1, 1976, through September 30, 1978. We determined that of these 656 former employees

--223, or 34 percent, retired, transferred to other Government agencies, returned to school, or left for other reasons and were not likely to be affected by the postemployment restrictions, and

--433 employees, or 66 percent, left for private sector jobs and could be affected by the postemployment restrictions. (See app. X.)

The majority of the personnel files did not contain information on whether the employees' private sector jobs involved working on Federal tax matters. However, the questionnaire that we sent to former employees who had left for private sector jobs in fiscal year 1978 shows that 71 of the 83 former employees, or 86 percent, were involved in Federal tax work, and 15, or 21 percent, of those 71 had an opportunity to participate in a matter which had been within their Government responsibilities. (See pp. 14 and 16.)

Of the 15 former employees who had faced these potential conflict-of-interest situations, 9 said that the situations had resulted from tax matters that their new firm was handling before they joined it, and 8 said that the situations resulted because they or their firms subsequently had been asked to handle the matter. (Three former employees faced conflicts of interest because of both reasons and one indicated that neither reason applied.)

THE TREASURY DEPARTMENT'S ADMINISTRATIVE SYSTEM HAS NOT BEEN USED AS AN ALTERNATIVE TO CRIMINAL ENFORCEMENT

We reported in 1978 1/ that the Department of Justice had prosecuted few alleged postemployment statute violations because

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1/"What Rules Should Apply To Post-Federal Employment and How Should They Be Enforced?" (FPCD-78-38, Aug. 28, 1978).

of the difficulty of (1) proving knowing intent to commit a violation and (2) demonstrating that there were consequences of the violation, e.g., that there was harm done. In addition, criminal prosecution was sometimes viewed as too severe for the action and no alternative remedy was available.

Civil disciplinary actions were authorized by the 1978 Ethics in Government Act as an alternative to criminal prosecution of postemployment restriction violators. However, like the criminal prosecution activity, the Treasury Department's administrative system for disciplining violators of its postemployment regulations, which has been in place for years, has seldom been used.

The Treasury Department's Director of Practice administers the system for disciplining violators of the Treasury regulations. Treasury's Inspector General and IRS' Internal Security Division investigate allegations of misconduct by IRS employees, and IRS' Office of Chief Counsel responds to inquiries from former employees concerning their postemployment participation in tax matters. These groups have not coordinated activities or exchanged information.

Administrative penalties have not been used to discipline violators of Treasury's postemployment regulations

During fiscal years 1978 and 1979, 16 suspected violations of the postemployment restrictions involving former IRS employees were investigated and closed. The Director of Practice was involved in only two of these cases. In both cases it was determined that Treasury's postemployment regulations had been violated. The cases were closed with private letters of reprimand which did not affect the violators' eligibility to practice at IRS.

One case involved a former revenue agent who, when employed by IRS, had participated in a determination that a certain purchase by a taxpayer was exempt from excise taxes. After leaving IRS, he acted as a representative of the same company requesting the same exemption for a similar purchase. The representation violated the IRS postemployment restrictions because the exemption request involved the same issues in the same factual setting as the determination the former employee had made. Because the individual had not understood the restrictions, his violation was considered not willful, and the matter was closed by the Director of Practice with a reprimand.

The second case processed by the Director of Practice also involved a former revenue agent who had been assigned to a corporation tax audit which resulted in the disallowance of a charitable deduction. After the employee left IRS, he represented

the corporation before IRS in a claim that the identical payment disallowed as a charitable deduction could be characterized as a bad debt deduction for a different tax year. The Director of Practice determined that, although a violation of the restrictions had occurred, disciplinary proceedings were not warranted. Accordingly, official action was limited to the issuance of a reprimand.

The Director of Practice did not have a record of the one case which had been investigated by the Treasury Department's Office of the Inspector General. Through interviews and review of the files, the Inspector General determined that the postemployment restrictions had not been violated, and the case was closed without informing the Director of Practice of the investigation or its results.

Also, the Director of Practice did not have information on another 13 postemployment cases investigated by IRS' Internal Security Division. The Division investigated these cases to determine if the postemployment statute had been violated but did not coordinate the investigations with the Director of Practice and also did not consider if a violation of the IRS restrictions had occurred.

Our review of the Internal Security Division's files on the 13 postemployment cases it had investigated showed that the Director of Practice had been contacted twice to obtain information pertinent to the investigations--once to find out if tax practitioners could solicit business and once to find out if a former revenue agent was authorized to practice before IRS. We found no evidence that any of the cases had been referred to the Director of Practice for information or possible administrative action.

The investigations indicated that the postemployment statute may have been violated in 6 of the 13 cases. All six cases were referred to U.S. attorneys and all six were declined for prosecution because they lacked evidence and/or prosecutive merit. 1/ For example, in one case, the assistant U.S. attorney did not prosecute due to a lack of criminal intent. In another case a technical violation of the law was noted but criminal prosecution was not deemed warranted. The six cases were closed, although in our opinion, the information in the case file indicated that the Treasury regulations may have been violated in all six cases.

1/These cases were closed before the administrative penalties for violations of the postemployment statute were authorized. However, administrative penalties for violations of the Treasury Department regulations governing practice before IRS were authorized at that time.

Potential violation	Number of cases
Former employee may have assisted and/or represented taxpayer in a matter he/she had worked on or been responsible for at IRS	a/5
Former employee may have represented taxpayer in a matter he had official responsibility for at IRS	1
Former employee's firm may have represented taxpayer in a matter that former employee had worked on at IRS	a/1

a/One case involved two potential violations.

In April 1979 the Assistant Commissioner (Inspection) wrote to IRS' Chief Counsel asking if the Ethics Act amendments to the postemployment statute would alleviate problems that the Internal Security Division had in enforcing the restrictions. The Deputy Chief Counsel (General) responded in June 1979 that the act should help the Division to secure conflict-of-interest prosecutions but also pointed out the need for (1) very careful preparation and review of cases before they are referred to the assistant U.S. attorneys and (2) additional training of inspectors in the conflict-of-interest area. In addition, the Deputy Chief Counsel pointed out that the cases which had been declined for prosecution should have been referred to the Director of Practice for administrative action.

In January 1980, the Director of Practice was given responsibility for disciplining violators of the postemployment statute. Treasury's regulations for implementing the statute provide that suspected violations of the statute be reported to the Inspector General who is to refer any information that he deems warranted to the Director. Although the Treasury regulations refer to the system for enforcing the regulations governing practice at IRS, policies for integrating the two systems or channeling postemployment information to the Director of Practice have not been established.

Potential conflict-of-interest situations are not monitored to ensure that violations of the restrictions do not occur

Although IRS does not monitor compliance with the postemployment restrictions, it does receive information on some potential

conflict situations through inquiries concerning the appropriateness of former tax administration employees' subsequent participation in particular tax matters.

The Treasury Department informed us that since 1977 IRS' Chief Counsel has handled at least 59 requests for advice concerning postemployment conflicts. Although in several instances the potential conflicts were recognized by IRS employees, most of the requests were made by former employees and/or their associates and firms. Treasury indicated that the majority of requests were made before the former employees had actually begun representing the taxpayer in the potential conflict situation. Treasury believes that in the overwhelming majority of cases, the practitioners would not disregard its advice that representation of the taxpayer would constitute a conflict of interest. Moreover, the Chief Counsel's Office furnishes copies of its letters of advice on postemployment conflicts to the Director of Practice, who may take whatever action he deems appropriate.

We noted, however, that the Director of Practice has not been given responsibility for following up on identified conflict situations. Our review of the 25 inquiries that had been documented by IRS' Chief Counsel in fiscal years 1978 and 1979 showed that nine conflict-of-interest situations involving former IRS employees had been identified. Former employees were disqualified from participation in four of the nine cases and were required to be isolated from the firms' participation in the matter in the other five cases. In these five cases, the firms were required to file isolation statements with the Director of Practice if they wished to participate in the matter. The Director of Practice received only two of the five isolation statements. Our review indicated that the three remaining statements were not filed and that the Director did not follow up on the matter to determine if they were required.

On the other hand, the Director of Practice does not review the isolation statements that he receives to determine if the former employees' associates should be disqualified from a matter in compliance with the IRS restrictions. As discussed on page 33, the postemployment restrictions that apply at IRS define two circumstances under which former employees' associates may not participate in tax matters because isolation would not eliminate the appearance of a conflict of interest. From August 1977, when this restriction became effective, to March 13, 1980, the Director of Practice received seven isolation statements. Of the seven statements, three did not contain the information that the Director of Practice needed to determine if the circumstances in fact existed and if the former employees' associates should have been precluded from participating in the matter.

JUSTICE AND IRS NEED UNIFORM POLICIES FOR ENFORCING THE POSTEMPLOYMENT RESTRICTIONS WITH RESPECT TO THE ASSOCIATES OF FORMER EMPLOYEES

When a former tax administration employee may not represent a client in a tax case because he/she had been involved in the case as a Government employee, his/her new associates also are disqualified from the case. They are disqualified because the free exchange of information and the sharing of fees among associates of firms can create the appearance, if not the reality, of a conflict of interest. Their associates, however, can avoid disqualification by isolating the former employee from any contact with the case so that a conflict of interest could not occur.

These disqualification and isolation requirements are based on the ABA's (1) disciplinary rule which provides that if a lawyer is required to decline or withdraw from a case because of a conflict of interest, the lawyer's partners and associates also are disqualified from participating in the case and (2) Formal Opinion 342 which provides that the Government can "waive" the disqualification of a former Government attorney's associates whenever it is satisfied that (a) the former employee is isolated from participating in the matter and sharing in the fees attributed to it and (b) there is no appearance of significant impropriety affecting the interest of the Government.

The Justice Department and IRS, however, administer the disqualification and isolation requirements differently. The differences relate to

--the procedures the former employee's associates must take to isolate the former employee and obtain the waiver and

--the conditions under which isolation of the former employee would not be sufficient to eliminate the appearance of a conflict of interest.

Minimum procedures for isolating former employees should be developed

The Justice Department and IRS have not defined the procedures that firms should follow to isolate former tax administration employees from matters in which the firms wish to participate. In practice, however, the Justice Department has required firms to follow certain minimum procedures before it will grant a waiver. These procedures are not required by IRS.

We reviewed five requests for waivers of disqualification received by the Justice Department's Tax Division in fiscal years 1978 and 1979. Our review indicated that the Division (1) verified that the former employee had had responsibility for the

matter and (2) reviewed the isolation procedures outlined by the former employee's firm. The waivers granted by the Tax Division were predicated on the following isolation procedures.

1. The firm's attorneys were to be notified of the former employee's disqualification with respect to the firm's client and instructed not to discuss any matters regarding the case with the former employee.

2. All case-related files were to be labeled that the contents were not to be exhibited to or discussed with the former employee.

3. The former employee was not to participate in any profit division resulting from the case.

4. The firm was to immediately inform the Tax Division of any breach in the above procedures.

Unlike the Justice Department, IRS does not review and approve firms' isolation procedures but automatically permits the firms' participation in a matter after a statement has been filed with Treasury's Director of Practice affirming that the former employee had been isolated. The IRS Chief Counsel's Advisory Committee on Rules of Professional Conduct, which recommended this procedure, believed that firms should determine how to isolate former employees themselves because Government-imposed requirements could be circumvented. Approving a firm's isolation procedures was not thought to be necessary as long as the firm had complied with the procedural requirement of filing the statement.

Our review of the seven isolation statements filed with the Director of Practice since the requirements became effective in August 1977 indicated that the amount of information provided on the firms' isolation procedures varied. Four of the statements simply indicated that the former employee would be isolated from assisting in the firm's representation of the client; the specific procedures taken to isolate the former employee were not mentioned. All three of the remaining statements indicated that the former employee would not discuss the tax matter with other members of the firm, but only two of the three statements indicated that the firm's employees had been notified of the former employee's disqualification. Also, none of the statements mentioned that the former employee would not share in the related profits or that the firm would notify IRS if its isolation procedures were breached.

Situations where isolation would not eliminate apparent conflicts of interest should be the same

The postemployment regulations that apply at IRS define two situations in which isolation of former employees would not eliminate the appearance of a conflict of interest and the disqualification of the former employees' associates would stand. Both situations relate to matters that employees are working on while they are considering other employment opportunities. The restrictions provide that the associates of a former employee may not participate in a matter if

--the associates knew of the employee's involvement in the matter and initiated employment discussions within 6 months after the involvement had ended, or

--the employee initiated employment discussions with the firm while participating in the matter.

The Justice Department, on the other hand, does not have regulations which state its policy concerning the disqualification of former employees' associates. The disqualification waivers involving the firms of former Justice employees that we reviewed did not contain any information to indicate that the Tax Division had considered if the timing of the job negotiations created the appearance of a conflict of interest when it granted waivers.

There was, however, an indication in one of the requests that the job negotiations could have occurred while the former employee was working for the Government on the matter in which the firm wished to continue participating. The firm wrote to the Justice Department's Tax Division requesting that it be permitted to continue representing two clients in matters that a Tax Division employee who had accepted an offer of employment would be disqualified from when he joined the firm. This letter was dated 7 days before the employee's separation date from the Tax Division, indicating that the job negotiations may have taken place while the Justice employee was working on the case.

Court opinions on the effectiveness of isolation have differed

The ability of firms to effectively isolate employees who are disqualified from matters that involve clients represented by their firm has been the subject of debate. A recent court case illustrates the differences of opinion which can exist concerning whether isolation of a disqualified attorney removes the appearance of impropriety.

In 1978 a defendant in a private lawsuit moved to disqualify the plantiff's counsel because a former Federal attorney was associated with the firm. The former Federal attorney had been personally involved in a previous case brought by the Government against the defendant concerning the same matter. The plantiff's firm had recognized that the former Federal attorney was disqualified from the case in question and had obtained approval from a judge and the Government agency involved in the prior case to represent the plantiff in the lawsuit after isolating the former employee from the case. The District Court Judge denied the motion to disqualify the plantiff's counsel from the lawsuit.

A three-judge appeals court panel reversed the denial in 1979 and disqualified the firm because of an appearance of a conflict of interest. Although the appeals court refused to write a general rule on firm disqualification in its decision, it suggested that cases involving matters that Federal attorneys had active, personal participation in required the disqualification of the entire firm. The court noted that even if the firm erected a "Chinese Wall" it would not be sufficient to eliminate the public perception of a conflict of interest in these situations.

However, this decision was also reversed. In June 1980 the full appeals court said that any possible appearance of impropriety was not enough to warrant disqualifying the entire firm as long as the former Federal attorney did not in any way participate in the case.

CONCLUSIONS

Because many tax attorneys and accountants leave the Government for related jobs in the private sector, some potential postemployment conflicts of interest are bound to occur. However, the Departments of Justice and the Treasury, including IRS, do not know if many former employees have faced potential conflicts of interest or if these conflict situations were resolved in compliance with the postemployment restrictions. Thus, the agencies do not have the information that they need to determine the level of enforcement needed to assure that their former employees are complying with the restrictions.

The kind of system needed to monitor former employees' postemployment activities cannot be determined until the agencies have a better measure of the conflict-of-interest problem in the tax system. If few former employees are facing potential conflict-of-interest situations, periodic evaluations of compliance with the restrictions may be all that is necessary to assure that conflicts of interest are satisfactorily resolved. If, on the other hand, many former employees are facing potential conflicts of interest, formal systems to detect violations of the restrictions may be necessary to enforce the restrictions.

In addition, the Treasury Department has not disciplined violators of its postemployment regulations. All postemployment cases closed during fiscal years 1978 and 1979 involved matters pending at IRS. Most of the cases were investigated by IRS' Internal Security Division as potential violations of the statute. Although the cases were not accepted by the Justice Department for prosecution, none of them were referred to Treasury's Director of Practice for administrative action even though it appeared that the Treasury regulations had been violated.

Treasury's failure to effectively enforce the restrictions stems from the lack of coordination between the various offices having enforcement responsibilities. Although the Director of Practice has overall responsibility, the IRS Chief Counsel's office responds to former employees' postemployment questions, and the Inspector General and IRS' Internal Security Division investigate suspected violations of the restrictions. None of these offices have coordinated their activities with the Director of Practice or provided him the information needed to enforce the restrictions. The Director of Practice needs to be informed of all postemployment conflict-of-interest cases so that he can be alert to postemployment problems and can initiate administrative proceedings when the investigations indicate potential violations of the postemployment statute and the Treasury regulations.

Finally, differences in the enforcement of the restrictions which apply to the associates of former employees should be resolved so that associates who may be prohibited from representing a client in a matter at IRS would not later be permitted to participate in the same matter if it were referred to the Justice Department for prosecution. A uniform policy on when and under what conditions the disqualification of a former employee will not extend to his or her firm is needed within the tax system where cases and responsibilities transcend agency lines.

The Justice and Treasury Departments should agree on the types of situations in which isolation of the former employee would not eliminate the appearance of a conflict of interest if his or her associates participated in it. General guidelines should be developed defining when disqualification of firms is required because isolation would not be sufficient to serve the best interests of the Government or the public.

Also, the two agencies should develop consistent policies on how they will enforce the isolation requirements. Guidelines on the minimum acceptable procedures for isolating former employees from matters should be published so that former employees and their associates will know what is expected of them.

RECOMMENDATIONS

We recommend that the Attorney General and the Secretary of the Treasury

--determine if postemployment conflicts of interest are a problem in the tax system by monitoring the postemployment activities of a sample of former employees, and then

--determine and establish the level of enforcement needed to reasonably ensure that conflicts of interest are resolved in compliance with the postemployment restrictions and that violations of the restrictions are detected.

To strengthen the enforcement of the postemployment restrictions within IRS, we recommend that the Secretary of the Treasury direct the Inspector General, the IRS Chief Counsel, and the Commissioner of Internal Revenue to establish procedures for (1) coordinating their postemployment responsibilities with the Director of Practice and (2) informing him of the conflict-of-interest situations and potential violations of the postemployment restrictions that come to their attention.

We also recommend that the Secretary

--give the Director of Practice responsibility for ensuring that the postemployment restrictions are not violated in identified conflict-of-interest situations and

--direct the Director of Practice to review isolation statements filed with his office and disapprove those which do not adhere to the minimum isolation procedures to be set forth (see below) or which involve conditions for which isolation would not eliminate the appearance of impropriety.

Also, we recommend that the Attorney General and the Secretary of the Treasury establish uniform regulations to enforce the postemployment restrictions that apply to the associates of former employees which

--set forth the minimum procedures that former employees' associates must follow to isolate former employees from participation in the tax matters and

--define the situations in which the disqualification of the former employees' associates should stand because isolation of the former employee would not remove the appearance of impropriety.

AGENCY COMMENTS AND OUR EVALUATION

The Justice and Treasury Departments, including IRS, indicated that they would not implement our recommendations to monitor the activities of former employees, on a sample basis, to determine if problems exist and establish enforcement systems commensurate with their findings. Justice said that it has no reason to believe that violations are widespread and that the report did not support such a conclusion. Treasury said that the report failed to disclose that any problem exists and failed to take into account its systematic methods for ascertaining if tax practitioners are engaged in conflict-of-interest situations. It believes that its present requirement that employees report unethical behavior by tax practitioners discloses the existence of conflicts of interest in the most practical and cost effective way. Treasury added that IRS is considering using its centralized file of power of attorney forms to determine which former employees are practicing before the IRS.

Justice and Treasury also discussed at length their lack of authority to require former employees to report or disclose their representational activities and the many problems and costs that a reporting system would entail. Justice and OGE pointed out that the Congress has not enacted a general requirement that agencies monitor the activities of former employees.

Treasury did not agree with our conclusion that violators of the restrictions have not been disciplined, but it generally agreed with our recommendations to strengthen its enforcement systems through better coordination within the Department.

The Commissioner of Internal Revenue took exception to our opinion that six of the cases investigated by the Internal Security Division should have been referred to the Director of Practice as potential violations of the Treasury regulations. According to Internal Security personnel, two of the cases were not referred because they involved individuals who were not attorneys, CPAs, or enrolled agents and, thus, were not subject to the Treasury Department's postemployment regulations. Such individuals are permitted limited practice before IRS. For example, return preparers may represent a taxpayer during the examination of a return that they prepared. These individuals are subject to rules regarding standards of conduct prescribed by the Commissioner and administered by the Director, Examination Division. Internal Security did not refer the other four cases to the Director of Practice because it believed that two of the cases did not involve violations of the restrictions and two of the cases did not present strong cases for discipline.

Also, according to Treasury, the absence of administrative disciplinary cases does not signify a lack of effort to achieve

compliance with the restrictions. Treasury said that indiscriminate punishment of all violators would not be consistent with OGE regulations which direct agencies to avoid enforcement actions that do not advance the purpose of the statute. It believes that administrative discipline is not warranted if violations were inadvertent or not actually harmful to the agency's or to the public's interest.

However, Treasury said that it is developing a reorganized ethics program that should achieve greater coordination among the different functions and assure that all appropriate information concerning violations of the postemployment restrictions will be reported to the Director of Practice. Treasury did not say if it planned to implement our recommendations that the Director of Practice (1) be given responsibility for assuring that the postemployment restrictions are not violated and (2) be required to review and approve the isolation statements filed with his office.

Both Justice and Treasury agreed that uniform regulations are needed with respect to the restrictions that apply to former employees' associates. Justice said that the adoption of uniform waiver conditions seems desirable and that it intends to consult with Treasury concerning the appropriate uniform standards.

Treasury said that it is considering revisions to its regulations that would require isolation procedures similar to those required by Justice. Treasury also pointed out that problems of isolation procedures are not unique to tax practice and suggested that a coordinated approach be developed by the Office of Government Ethics for all agencies.

We fully agree with the agencies that the postemployment problem needs to be measured as a prerequisite for determining what type of monitoring system would assure compliance with the restrictions. Before OGE was established, we endorsed its creation and recommended that, in collaboration with the executive branch agencies, it determine the extent to which the postemployment activities of former Government employees may be a problem and recommend the actions needed to enforce the postemployment statute. 1/ OGE and the agencies, however, have not implemented these recommendations.

As OGE pointed out in its comments, the agencies have to allocate their limited resources among competing program activities. Presently, the agencies do not have the information they need to decide the level of resources that should be committed to assuring compliance with the postemployment restrictions.

1/"What Rules Should Apply to Post-Federal Employment and How Should They Be Enforced?" (FPCD-78-38, Aug. 28, 1978).

Justice and Treasury are unwilling to develop this information because they do not believe that postemployment conflicts of interest could be a problem in the tax system. This is in spite of the fact that our review clearly indicates that the potential for such problems exists. Since the agencies have not tried to find out what types of conflict situations their former employees face or how frequently these situations occur, they have no basis for their belief. This information, in our opinion, is just as important as the number of violations in considering the level of enforcement action needed. The agencies are in the best position to obtain this information because they are most familiar with the positions and matters that are subject to postemployment conflict situations. With the cooperation of their employees, they can obtain this information with a minimal investment of time and effort.

We agree with Treasury that its system for detecting violations probably is reliable for detecting the most obvious types of conflict situations; for example, individuals representing clients in cases in which they had been directly involved as Government employees. Former working relationships or material in the case file should be enough to alert Treasury employees--who are aware of the restrictions--to potential violations. However, we do not believe that Treasury can rely on its employees to detect less obvious types of conflict situations because the information they would need would not be readily available to them. For example, an employee is not likely to know that an individual should not be permitted to represent a taxpayer because a member of his firm worked on the case as a Government employee. Moreover, we doubt that IRS' power of attorney files would be helpful in identifying these types of situations.

We also agree that the agencies' authority to impose a postemployment reporting system is questionable. Although we previously reported that a statutory postemployment reporting requirement would be one way to enforce the law, we believe that there are other steps that can and should be taken in the absence of reporting requirements. We discuss and recommend these steps in this report. Our recommendations are aimed at having the agencies determine the extent of the postemployment conflicts-of-interest problem by monitoring the postemployment activities of a sample of former employees. We do not have in mind the immediate installation of a permanent postemployment monitoring or reporting system. Rather, our concern is with first developing information on the scope of the problem. This information would enable the agencies to implement our second related recommendation concerning the development of enforcement procedures. There are several monitoring methods which, with the cooperation of current and former employees, would provide the agencies with information on the scope of the problem.

For example, a former Justice attorney told us that after he left the Department he reviewed a list of his firm's cases to determine if he and/or his associates were disqualified from participating in any of them under the restrictions. Another attorney told us that his firm's associates review all new cases for potential conflicts of interest. It seems to us that most former employees would have to go through similar exercises to comply with the restrictions.

The agencies could request a sample of their former employees to notify them of the potential conflict-of-interest cases that they identify. Or, as an alternative, the agencies could ask a sample of employees who have accepted employment offers to review their most recent cases for potential conflicts before they leave. The agencies could then use this information as an indication of the types and number of potential conflict situations that former Government tax attorneys and accountants are facing. They could also place a notice of the potential conflict in the case file so that employees working on the case would be alert to potential violations.

The agencies are in the best position for deciding if the above suggestions or other methods would be the most efficient and reliable for measuring the postemployment problem. Once they have this measure, they can decide if they should seek authority from the Congress to require postemployment reporting or establish other types of monitoring that would be more efficient and just as effective.

We disagree with the Commissioner's opinion that the six cases investigated by the Internal Security Division should not have been referred to the Director of Practice. Two of the cases in question involved former IRS employees representing taxpayers in cases on which they had worked. It appears that if these individuals had been enrolled agents, their cases would have been candidates for disciplinary action. We question the fairness and appropriateness of having different postemployment regulations apply to former employees of the same agency. We suggest that the Commissioner determine if individuals not enrolled to practice at IRS could become involved in the same type of postemployment conflict situations as enrolled agents. If such situations can occur, we believe that the Commissioner should make the necessary arrangements to insure that nonenrolled former IRS employees representing taxpayers be subject to the same postemployment restrictions as enrolled agents, CPAs, and attorneys.

The other four cases involved technical violations of the regulations. The Director of Practice is responsible for enforcing Treasury's postemployment regulations. To fulfill this responsibility, he needs to be aware of all potential violations.

Our conclusions concerning Treasury's failure to discipline violators is not based on the absence of cases but on the fact that the few cases which have surfaced have not been subjected to the administrative disciplinary system. The OGE regulation that Treasury referred to states that it is essential that the restrictions be effectively enforced. Agencies are instructed to act on the premise that they have primary enforcement responsibility and that criminal enforcement may be undertaken in cases involving aggravated circumstances. They are directed to avoid only unnecessarily severe applications which do not serve the statute's purpose.

In our opinion, it is a function of the administrative disciplinary system to determine if and what penalties are appropriate. These determinations should be made by the Director of Practice, who is responsible for the system. They should not be a factor in determining if cases should be referred to the Director for processing.

We also believe that the reponsibilities for following up on identified conflict situations and approving isolation statements, which have not been assigned, should be given to the Director of Practice.

APPENDIX I

U.S. Department of Justice

APR 27 1981

Washington, D.C. 20530

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

Thank you for providing the Department of Justice (Department) with an opportunity to comment on the draft General Accounting Office (GAO) report entitled Federal Tax System Post-Employment Conflicts of Interest: A Potential Problem That Can Be Prevented. The report makes two recommendations to the Department in connection with the education and training of presently employed and separating personnel, and makes additional recommendations relating to enforcement of post-employment restrictions.

As the report notes, the Office of Government Ethics only recently issued its final regulations on Federal agency ethics programs, including programs relating to post-employment conflict of interest restrictions. The Department has been developing an ethics program and is in the process of finalizing its program in response to the recent Office of Government Ethics regulations. Under the circumstances, our comments represent preliminary thoughts concerning your recommendations and are subject to reconsideration in conjunction with implementation of related aspects of the Office of Government Ethics regulations.

Education and Training

At the present time, the Department provides newly recruited and separating personnel with a summary of the Ethics in Government Act. The summary indicates that each employee is responsible for reviewing the applicable statutory and regulatory provisions. In this regard, the draft report is incorrect in stating on page 13 that the Tax Division does not notify departing employees of post-employment restrictions. The Department adopted the procedure of providing a summary of the Ethics in Government Act to its employees in September 1980, and that procedure has been followed by the Tax Division. Moreover, the Department is designing a Departmental ethics program which meets the requirements of the regulations published in January 1981 by the Office of Government Ethics. [See GAO note (1) at end of letter.]

In designing training and educational manuals on post-employment restrictions, however, our present view is that it is neither necessary nor desirable for the Department to prepare separate materials for each specialized area of the law for which Departmental attorneys have responsibility. Our current thinking is that examples of the application of the Ethics in Government Act

in litigation settings, covering many different types of cases, including tax cases, would be a more valuable educational tool and, at the same time, would be less burdensome and cumbersome than a segmented approach.[1]

The draft report also recommends that the Department adopt a new certification procedure for separating employees, under which the Department would:

> --require separating employees to certify, in the presence of their supervisors, that they have read, understand, and will comply with the post-employment statute, the regulations governing practice before IRS [Internal Revenue Service], and the legal profession's code pertaining to former Federal employees.

We understand that the IRS "separating employee clearance" form includes a certification concerning applicable IRS and Department of Treasury restrictions on post-employment conflicts of interest. although it is not identical to that proposed in the draft report. The Department is not inclined to favor adoption of the recommended certification requirement. In our view, a certification of this nature would have no effect on compliance and most separating employees would find it offensive. Consideration will be given, however, to requiring a separating employee to acknowledge receipt of materials relating to post-employment conflicts of interest.

Enforcement of Post-Employment Conflict Restrictions

The draft report contends that: "Monitoring systems need to be established to provide a reasonable degree of assurance that violations of the restrictions will be detected." The recommendations segment of the draft is framed more narrowly, urging that the Department monitor the post-employment activities of a sample of former employees in order to determine the degree to which post-employment conflicts of interest are a problem in the tax system. A related recommendation is that enforcement levels be set ". . .to provide a reasonable degree of assurance that conflicts of interest are resolved in compliance with the post-employment restrictions and that violations of the restrictions will be detected."

The contention that Government agencies should be required to monitor the representational conduct of their former employees is not new. GAO made the same recommendation to the Congress during consideration of the legislation ultimately enacted as the Ethics in Government Act, in a report entitled What Rules Should Apply to Post-Federal Employment and How Should They Be Enforced? pp. 25-27 (FPCD 78-38, August 28, 1978). The Congress declined

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[1] We would, of course, be pleased to consult with the Treasury Department and the IRS in connection with any interpretative guides which they may wish to prepare on this subject.

to impose a requirement of monitoring on Government agencies generally,[2] and the Department's view is that the monitoring, even on a sampling basis, of post-employment representational activity by former Justice attorneys could not effectively be performed without infringing substantially on other important interests and, in any event, would create difficult practical problems. For example, the only effective means of monitoring post-employment conduct of Justice's former attorneys would be through a requirement that attorneys file reports on their representational activities. The Department, however, has no authority to require reporting or disclosure by former employees of representational conduct undertaken after termination of Government service. [See GAO note (2) at end of letter.]

Even if authority to impose a reporting system existed, such a system would represent a severe imposition on the representational activities of former Justice attorneys and would raise legitimate and serious concerns of the American Bar Association. Indeed, a reporting system would be comprehensive only if it required the attorney to provide the Department with a description of every matter in which the attorney was providing representation before the IRS or in a case for which the Department was responsible.

Furthermore, Departmental trial attorneys typically are responsible for a substantial docket of cases and, over a period of four to five years, an attorney may have direct responsibility for five hundred or more cases.[3] Supervisory personnel may have "official responsibility" for one thousand or more cases at any point in time. Thus, the tremendous volume of cases would make any type of cross-checking an impossible burden.[4]

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[2] The reasons why Congress rejected the GAO recommendation on monitoring are not reflected in the legislative history of the Act. Perhaps Congress was persuaded by practices of the foreign countries surveyed by GAO which also have post-employment restrictions. What Rules Should Apply to Post-Federal Employment and How Should They be Enforced? pp. 37-42. None has adopted a monitoring system.

[3] In addition to the cases over which a trial attorney may have had direct responsibility, he or she will have "participated personally and substantially" in a large number of other cases through consultation with colleagues on matters for which the attorney was not directly responsible.

[4] The IRS would have an even more serious problem because of the much larger number of former IRS employees to whom the restrictions apply. In addition, the regulations on practice before the Treasury Department regulate not only the conduct of former IRS personnel, but also representational activities of those associated with such former employees. Every representation undertaken by the accounting firm or law firm would have to be cross-checked by IRS to determine whether any former IRS official who is associated with the firm had "personally and substantially" participated in the matter while working for the IRS.

GAO's recommendation that monitoring is necessary is premised on the fact that a substantial number of personnel formerly employed in the tax system subsequently provide representation in tax matters in the private sector, and as a result, could violate the conflict of interest restrictions. The emphasis is on potential abuse, with a disclaimer that there is no data base detailing actual abuse. We have no reason to believe that violations of the conflict of interest restrictions are widespread and nothing in the draft report would support such a conclusion. The report merely notes that personnel formerly employed in the tax system have recognized some conflict of interest situations, and in most instances, have resolved the question without asking the former agency for advice. Perhaps advice was not sought from the agency because the former employee was unaware that this service was available. Such lack of awareness is less probable under the present practice of providing a summary of the Ethics in Government Act to employees, and we can expect further improvement as the Office of Government Ethics regulations are fully implemented.

Finally, the draft report recommends that the Department of Justice and the Department of the Treasury utilize the same standards in enforcing post-employment restrictions that apply to associates of former employees. Treasury directly regulates representational activities of such associates under rules for practice before the Treasury Department (31 C.F.R. Section 10.26). The Department does not have any direct power to restrict the practice of law by associates of former employees. Its role is limited to the imposition of the conditions under which it will waive the disqualification of a law firm when requested on the authority of American Bar Association Opinion 342. Nevertheless, to the extent practicable, the adoption of uniform waiver conditions would seem to be desirable, and we intend to consult with Treasury concerning the appropriate uniform standards.

Sincerely,

Kevin D. Rooney
Assistant Attorney General
for Administration

GAO notes: (1) The draft report was revised to state that Justice employees are given a summary of the statute.

(2) The report recommended that the Congress "establish specific agency responsibility and authority to enforce post-Federal employment prohibitions."

APPENDIX II

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

APR 24 1981

Dear Mr. Anderson:

This constitutes the comments of the Department of the Treasury on the draft Comptroller General report entitled, "Federal Tax System Post-Employment Conflicts of Interest: A Potential Problem That Can Be Prevented." Below we specifically address the conclusions and related recommendations contained in the draft report. (pp. 31-33)

In summary, the draft report fails to disclose that any problem exists. The draft fails to take account of the systemic methods for ascertaining whether tax practitioners are engaged in conflict of interest situations, fails to recognize the considerable efforts the Treasury Department has made to educate present and former employees concerning applicable restrictions, and fails to recognize the effectiveness of the Department's enforcement systems. These failings appear to stem in part from over reliance on a questionable statistical survey and an under appreciation of the personal responsibility of sophisticated tax practitioners to conduct themselves in an ethical manner with an awareness of all appropriate restrictions.

The draft report does make some valid observations which would suggest areas for change. Some of these have already been under consideration within the Department, and the others will now be considered.

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Conclusion: Treasury (and Justice) do not know how many employees face potential conflicts of interest, or if such conflicts are being resolved in compliance with the post-employment restrictions. Depending on the number of conflicts that involve former employees these agencies may need to institute "periodic evaluations of compliance with the restrictions" or "formal systems to detect violations of the restrictions". (p. 31)

Recommendation: Monitor the post-employment activities of a sample of former employees, and based on the problems disclosed, establish an appropriate level of enforcement to ensure compliance with the post-employment restrictions and to detect violators. (p. 33)

Response: The present system reasonably discloses the existence of potential post-employment conflicts of interest in the most practical and cost effective way. All Internal Revenue employees are required to report any behavior on the part of tax practitioners that may be unethical, including post-employment conflicts. IRM 0735.1, IRS Handbook of Empolyee Responsibilities and Conduct, § 217.4; Treasury Circular No. 230 (31 C.F.R. Part 10) § 10.53. Personnel in the IRS Examination Division are specifically instructed as follows:

> If any person appears to represent a taxpayer under circumstances indicating a possible violation of the prohibition set forth in IRM 4055.23:(1) [Summary of post-employment restrictions in Circular No. 270, ¶ 10-26] above, Service employees should advise the individual concerning the existence and content of Circular No. 230. If a practitioner believes that he/she does not come within the purview of any section of the Circular restricting or prohibiting his/her appearance in the matter, he/she may be recognized and allowed to appear as a representative at his/her own risk with the understanding that the matter will be fully reported to the Director of Practice for consideration of and possible disciplinary action. To do otherwise would constitute a summary suspension of his/her right to practice without an opportunity for a hearing and a violation of the rules applicable to disciplinary proceedings. The Office of the Director of Practice may be contacted by telephone (202-376-0767) for an informal opinion on the matter prior to the holding of a meeting or confernce. IRM 4055.23(2).

Referrals are being made, as required, by IRS offices when former employees have sought to represent taxpayers in matters with which they were involved as government employees. That is because the former employee's involvement is either known to former colleagues in the office where the case is pending, or the former employee's involvement is shown by material in the case file. Thus, a monitoring system for post-employment conflicts, already

APPENDIX II

exists, without the necessity of conducting a potentially expensive and time consuming check every time a former government employee appears in a case. Additionally, former employees have, to a great extent been voluntarily bringing questions concerning potential post-employment conflicts to the attention of appropriate Treasury Department officials.)

It must be noted that very shortly after the enactment of the Agency Practice Act, 5 U.S.C. § 500, Pub. L. 89-332, 79 Stat. 1281 (November 8, 1965), the Internal Revenue Service abolished form 901 that was used to monitor former Government employees' appearances before the IRS. That action was taken because it was the view of the Chief Counsel that the Act forbade pre-appearance monitoring of attorneys and CPAs, and that it would be discriminatory to continue the system solely with respect to enrolled agents. This contemporaneous interpretation of the Act by the agency most concerned with its application is reflected in a December 9, 1965 memorandum from Mitchell Rogovin, Chief Counsel of the IRS, to the General Counsel of the Treasury Department. Thus, considerable question exists whether a Government agency may even ascertain from a representative, as a prerequisite to appearance before the agency, whether the representative is a former Government employee. If the correct view is that the agency may not ask, then a massive effort would be required to check each representative against a master listing of former Government employees (not just Treasury employees, but employees of other agencies such as the Justice Department). This would be a particularly onerous administrative burden, especially since it has not been established that a problem exists. It also seems likely that those agencies that have nevertheless instituted formal post-employment montitoring systems (e.g., the FTC), do not deal with the volume of administrative proceedings, such as tax audits, that the Service must handle.[1]

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[1] The requirement of running a check every time a former IRS or Chief Counsel employee appears on behalf of a taxpayer would not only seriously delay matters, but may make the former agency employees less desirable respresentatives for clients than those attorneys and agents who were never employed by the government, and who would not need prior approval every time they appeared.
(continued on next page)

The power of attorney forms filed by attorneys and other representatives in connection with appearances before the IRS (Forms 2848 and 2848-D) have long included explicit notice that representatives are subject to the regulations in Circular No. 230. These forms are currently being revised to also include specific notice that former employees of the Federal Government are subject to the post-employment restrictions contained in 18U.S.C. § 207 and § 10.26 of Treasury Department Circular No. 230. Former employees will also be advised, in the revised instructions to these forms, that criminal penalties are provided for violations of the post-employment restrictions contained in § 207.[2]

All employees in the Department are furnished upon entrance on duty with a copy of the Treasury Minimum Standards of Conduct, 31 C.F.R. 0.735-1, et seq., which includes in section 0.735-21 a summary of the post-employment restrictions. Department employees are required to know these provisions.

In addition, all attorneys leaving the employ of the Chief Counsel are currently furnished with Chief Counsel Order No. 1242.2B (June 2, 1975), "Conflicts of Interest - Post-Employment Prohibitions", informing these departing

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(continuation of [1])

By thus diminishing the ability of former employees to find suitable positions in the field of tax practice, the IRS and Chief Counsel could very well be hampered in recruiting the highly competent work force that is now attracted to Federal employment. We note that Congress, in drafting the conflcit of interest laws, recognized that mobility on the part of Government employees was entirely proper and should, in fact, not be discouraged. See S. Rep. No. 2213, 87th Cong., 2d Sess. 5, and H. Rep. No. 748, 87th Cong. 1st Sess. 3, accompanying the 1962 comprehensive amendments to the conflict of interest laws, Pub. L. 87-849 (October 23, 1962).

[2] We understand that the Service is also considering permitting its compliance functions to have access to the contralized files of Forms 2848 and 2848-D, in order to determine which former employees are practicing before the Service.

these departing personnel of the statutory restraints and prohibitions of 18 U.S.C. § 207 and the provisions of Treasury Circular No. 230 that restrict practice before the Service. Furnishing this information on departure has been a long-standing practice of the Office of Chief Counsel, dating from at least the promulgation of the present Order.[3] Chief Counsel order No. 1242.2B, Appendix 2 (distributed with the Order) also contains Chief Counsel's Announcement 1969-1, stating the Chief Counsel's nonacquiescence in McPherson-Sanford Trust v. Commissioner, 52 T.C. 580 (1969), in which the United States Tax Court rejected the Government's motion to disqualify a former Regional Counsel attorney for a post-employment conflict under the ABA Canons of Ethics (now superseded by the Code of Professional Responsibility).[4] Chief Counsel employees must also sign

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[3] Chief Counsel Order No. 124.2B superseded order No. 1242.2A (August 2, 1973), which contained similar information, and which, in turn, superseded Order No. 1242.2 (May 14, 1973) on the same subject. Chief Counsel Order No. 1242.2 itself reflected the cancellation of Chief Counsel Memorandum 1962-1 and Conflicts of Interest-Post-Employment Prohibitions Document No. 5625 (10-65).

[4] It is generally accepted in the legal profession that all practicing attorneys are charged with knowledge of the ABA Code of Professional Responsibility (CPR), which includes the post-employment restrictions in Canon 9 (appearance of impropriety and DR 9-101(B) thereto, as well as Canon 4 (protection of confidences and secrets) and DR 4-101(B) thereto, and Canon 5 (prohibition on switching sides) and DR 5-105(A) and (B) thereto. The standards in the CPR are generally applicable to attorneys in the Office of the Chief Counsel, Chief Counsel Order No. 1242.2D, although some question has been raised as to whether a Government agency may follow the Code of a private organization. These restrictions have on occasion required the Office of the Chief Counsel to seek the disqualification of a former Government attorney's law firm or co-counsel under CPR, DR 5-105(D):

> (D) If a lawyer is required to decline employment under a disciplinary rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

a Separating Employee Clearance Form (M-6334) stating that they have read, and agree to uphold, the post-employment requirements set forth in IRM 0735.1, § 222.1 and in the Treasury Minimum Standards of Conduct. (The employee's Supervisor must certify that the employee has read the requirements in his/her presence).[5] [See GAO note (1) at end of letter.]

The General Legal Services Division of the Office of the Chief Counsel [which has the delegated authority to act on behalf of the Treasury Department's Ethics Counselor pursuant to the Department's Standards of Conduct] has also discussed post-employment restrictions with former Commissioners and Chief Counsels on their departure, and at meetings with IRS Regional Commissioners and other high-level Service officials (e.g., District Directors), and with IRS Regional Counsels and other high-level personnel of the office of the Chief Counsel. (Appropriate written summaries have also been furnished at such meetings.) Similarly, the Office of the General Counsel has performed the same function for other Senior Employees in the Department. Senior Government employees are thus fully apprised of the one-year "no-contact" rule, 18 U.S.C. § 207(c), added by the Ethics in Government Act of 1978, as amended, and the added restrictions on assisting in representation, 18 U.S.C. § 207(b)(ii), that are applicable to them by virtue of their high-level Government positions. The handful of employees who are Senior Government employees are thus being directly, personally and fully apprised of the particular post-employment rules applicable to them. (We believe that due to the small number of employees affected by these rules, they are best informed of their post-employment restrictions in this "informal" fashion.) Moreover, information concerning the Ethics in Government Act amendments to 18 U.S.C. § 207 have been widely disseminated to all Chief Counsel employees. See, e.g., Chief Counsel Notice No. N-1242.10 (July 16, 1979). In this regard, the Treasury Department is in the process of preparing a handbook containing relevant material on the post-employment restrictions (e.g., the OPM post-employment regulations) for distribution to all employees.

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[5] The bulk of former Government attorneys in tax practice are, of course, from the Office of the Chief Counsel.

The Internal Revenue Manual also provides for Service employees to be apprised of the post-employment restrictions. IRM 0300.166, 0715.17, et seq. Prior to leaving the Service, the departing employee's supervisor must certify that the employee has read, in the supervisor's presence, the provisions of IRS Handbook of Employee Responsibilities and Conduct, IRM 0735.1, § 221.1(3), and the Treasury Minimum Standards of Conduct, § 0.735-21(c), (d) (31 C.F.R. § 0.735-21(c), (d)) (summarizing the post-employment restrictions). The departing employee must sign a statement that he/she has read the post-employment requirements and agrees to uphold them (a copy of Form 5389, Separating Employee Clearance, containing the supervisor's and employee's certification is enclosed hereto.) The IRS also emphasizes to employees the fact that when they leave the Service they will be subject to the post-employment restrictions by furnishing all personnel with Document 6603, IRM Exh. No. 0300-13 (copy enclosed), summarizing the provisions of 18 U.S.C. § 207. The restrictions in the statute are also summarized in Treasury Minimum Standards of Conduct, § 0.735-21(c), (d), which, as noted above, separating employees must reread during the separation clearance process.

In addition, all employees in the Service must read and be continuously acquainted with the provisions of the IRS Handbook of Employee Responsibilities and Conduct, IRM 0735.1 and the Treasury Minimum Standards of Conduct, (containing summaries of the post-employment restrictions), which each employee is furnished with upon entrance on duty. These documents are made applicable to the Office of the Chief Counsel attorneys and other personnel by Chief Counsel order No. 1242.4D (March 11, 1977). In fact, the Office of the Chief Counsel make reference to the post-employment restrictions in its recruitment brochures. All employees of the Chief Counsel's Office and the Service were additionally furnished with copies of the IRS Handbook of Employee Responsibilities and Conduct and Treasury Minimum Standards of Conduct on the following dates:

MT 0735.1-11	12-10-80
MT 0735.1-10	4-27-79
MT 0735.1-9	1-16-79
MT 0735.1-8	12-18-78
MT 0735.1-7	1-18-78
MT 0735.1-6	3-31-77

[See GAO note (2) at end of letter.]

The Treasury Minimum Standards of Conduct gives interpretive authority to the Department"s Ethics Counselor and Deputy Ethics Counselors; Employees may consult them on questions concerning the post-employment restrictions. Additionally, OPM has issued a comprehensive set of post-employment regulations at 5 C.F.R. Part 737, which contain reasonably definitive interpretations of the restrictions.

The foregoing measures are meant to ensure that all employees are acquainted with the post-employment restrictions and voluntarily comply with these restrictions when they leave the Service or the Office of the Chief Counsel. It is our understanding that the effectiveness of these measure will be subject to the scrutiny of the Office of Government Ethics in its designated role as auditor of agency ethics programs pursuant to Title IV of the Ethics in Government Act.

II

Conclusion: The Treasury Department does not discipline violators of the post-employment regulations. Cases investigated by the IRS Internal Security Division were not referred to the Director of Practice. Treasury's failure to effectively enforce the restrictions stems from a lack of coordination among the Office of the Chief Counsel, which responds to former employees' post-employment questions, IRS Internal Security and the Inspector General, which investigate suspected violations of the restrictions, and the Director of Practice, who is responsible for administrative enforcement of the restrictions. (pp. 31-32)

Recommendation: The Secretary of the Treasury and the Commissioner of Internal Revenue should direct the Inspector General, Chief Counsel and the Internal Security Division to establish procedures for coordinating their post-employment responsibilities with the Director of Practice and for informing the Director of the conflict of interest situations and potential violations of the post-employment restrictions that come to their attention. The Director of Practice should be given greater responsibility for assuring that the post-employment restrictions are not violated in identified conflict of interest situations. (p. 33)

Response: The present organizational arrangement in the Treasury Department for handling post-employment conflict of interest situations reflects a logical and necessary split in authority among the Chief Counsel of the IRS, who is the Deputy Ethics Official for the IRS, the Inspector General and the IRS Internal Security Division, who have investigative responsibilities, and the Director of practice who is responsible for the institution of administrative enforcement proceedings under the post-employment regulations. Nevertheless, post-employment violations are being reported to the Director of Practice, as disclosed by that Office's records.

A check of the Office of the Chief Counsel's General Legal Service Division case files shows that since 1977 it has handled at least 59 requests for advice concerning post-employment conflicts. For the most part such requests have been made directly by former Service or Chief Counsel employees and/or their associates and firms, although in several instances potential conflicts have been recognized by former colleagues in the IRS offices before which the subject matter of the potential conflicts were pending. The General Legal Services Divison cases files indicate that the majority of referrals of potential post-employment conflicts occurred before the former employee had actually commenced representing the taxpayer in potentially prohibited circumstances. Moreover, copies of General Legal Services Division's legal opinions and letters of advice on post-employment conflicts are regularly furnished to the Director of Practice who may take whatever action, in his discretion, is deemed appropriate. Possible criminal violations of 18 U.S.C. § 207 are also referred, as required, to the IRS Inspection Division or the Treasury Department's Inspector Gneral for investigation, and, if warranted, referral to the Department of Justice for prosecution. [See GAO note (3) at end of letter.]

When former employees and their firms have been advised that representation of a particular taxpayer would constitute a conflict of interest, it appears that in the overwhelming majority of cases the disqualified practitioners have not acted in disregard of this advice. In those cases where statutory or regulatory restrictions

have already been violated, prosecution or administrative discipline may not necessarily be warranted, such as where the violations have been inadvertent and not actually harmful to the agency's and the public's interests. Indiscriminate punishment of all violations may not necessarily be consistent with the objects of the Ethics in Government Act, under which agencies that have responsiblity for administrative enforcement of the law are directed to avoid enforcement actions that do not advance the objects of the Act. See 5 C.F.R. § 737.1(c)(6). Thus, the absence of numerious prosecutions or administrative disciplinary cases brought against former Service or Chief Counsel employees does not signify a lack of appropriate efforts to achieve compliance with the post-employment restrictions.[6]

The Office of Government Ethics' regulations, 5 C.F.R. 738, were issued January 9, 1981 (46 F.R. 2582). In response thereto, the Treasury Department has been developing a reorganized ethics program that should achieve greater coordination among the different functions tht have ethics responsibilities under the Designated Agency Ethics Official. The Director of Practice already has responsibility for initiating administrative enforcement proceedings for violations of 18 U.S.C. § 207(a), (b), and (c), and for violations of Treasury Circular No. 230. 31 C.F.R. §§ 10.54, 15.737-11. Increased coordination in the Department's ethics program should ensure that all appropriate information concerning violations of post-employment restrictions will be reported to the Director of Practice.

III

Conclusion: The Treasury and Justice Departments should develop consistent guidelines concerning when disqualification of a former employee's associates is

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[6] The Commissioner of Internal Revenue takes exception to the assertion in the report that 13 internal security cases should have been referred to the Director of Practice. The Commissioner's comment is based upon a review with your staff of the actual cases referred to in the report. The Commissioner takes the position that only two of the 13 were even arguably appropriate for referral, and those two did not present strong cases for discipline. [See GAO note (4) at end of letter.]

required, and a consistent approach to isolation procedures that the Departments require before waiving disqualification of the former employee's associates. (p. 32)

Recommendation: The Treasury and Justice Departments should develop uniform regulations setting forth minimum acceptable isolation procedures in those situations in which isolation would be insufficient to remove disqualification of a former employee's associates. The Director of Practice should be directed to review isolation statements filed by a former employee's associates and to disapprove those that do not adhere to the minimum acceptable procedures set forth in the regulations.

Response: Revisions to Treasury Circular No. 230 are curently being considered along the lines recommended in the GAO draft, and were, in fact, under consideration prior to the issuance of this draft. The revised regulations would require isolational procedures to conform to those standards that are now generally being required by courts, before the courts will accept a Government agency's waiver of the disqualification of a former employee's associates. These requirements we believe will, of necessity, be substantially similar to the procedures that are required of former employees by the Justice Department, which practices before the courts and must, therefore, adhere to those standards that the courts generally apply.

Problems of isolation procedures are [not] unique to tax practice. As such, a coordinated approach should be developed by the Office of Government Ethics for all agencies.

Sincerely yours,

David R. Brennan
Acting General Counsel

William J. Anderson, Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Enclosures GAO notes: (1) The draft report was revised to state that Chief Counsel employees also are subject to the certification requirement.

(2) The draft report was revised to state that IRS annually redistributes its conduct regulations.

(3) The draft report was revised to include additional information on the requests for postemployment advice.

(4) The report states that 6, not 13, internal security cases should have been referred to the Director of Practice.

APPENDIX II

SEPARATING EMPLOYEE CLEARANCE

Part I – General Information

Employee Name		SSN	Position Title
Division	Branch	Section	Effective Date of Action
Action: ☐ Separation ☐ Reassigned ☐ Transfer ☐ Change in Appointing Office		Forwarding Address:	

Designated Agent:

Part II – Return of Accountable Government Property

Item	Accounted For	Item	Accounted For	Item	Accounted For
1. Personally Charged Property		8. Handbook, Manuals Correspondence, etc.		16. Other Credentials & Passes	
2. Badge No.		9. Cash Receipts Books		17. Civil Defense I.D. No.	
3. Pocket Commission No.		10. Training Material		18. Transportation requests	
4. I.D. Card No.		11. Negotiable Items (bonds, currency)		19. Binoculars	
5. Keys		12. Office Records		20. Travel Advances	
6. Motor Vehicle Operator I.D. Card No.		13. Camera Equipment		21. Other	
7. Firearms & Ammunition		14. Tools, Supplies, non-expendable property & equipment			
		15. Credit Cards			

Part III – Certification

Section A – Supervisor

☐ All property and other items charged to the subject employee of which I have record or knowledge have been returned.
☐ The following items have not been accounted for:
☐ The employee has read in my presence, the requirements pertaining to conflict of interest as certified in Part G below.

Signature *(Supervisor)*	Date

Section B – Timekeeper

Number of hours of Advanced Leave – Sick_____. Annual _____.

Signature *(Timekeeper)*	Date

Section C – Facilities Management or Administration

☐ Property Settlement made, or no liability
☐ Property Settlement not made. Case referred to Chief, Fiscal Section for proper action.

Signature	Date

Section D – Fiscal Section

☐ Employee clear on all fiscal matters and check can be released
☐ Employee has outstanding obligation as follows:

Signature	Date

Section E – Training

☐ Employee has returned all training material for which he was accountable

Signature	Date

Form 5389 (3-75) Department of The Treasury–Internal Revenue Service

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Section F – Personnel Branch

- ☐ Received moving expenses under P.L. 89-516 and remained in Government service for 12 months or following the effective date of transfer or appointment.
- ☐ Received moving expenses and resigned or vacated position without authority in less than 12 months from date of transfer or appointment.
- ☐ Did not receive moving expenses.
- ☐ Employee was issued a Security Clearance (Protective Programs Office, must be notified of this separation via IRS Form 4323)
- ☐ Employee was not issued a Security Clearance
- ☐ S.F. 2815 has been completed (Employee Service Statement)
- ☐ S.F. 2019 has been completed (Request for Disposition of Salary Checks and/or Savings Bonds).

Signature | Date

Section G – Employee

1. I certify that:
   a. I have returned all government property and identification media for which I was accountable or which I had in my possession;
   b. I have no indebtedness to the Internal Revenue Service for travel advances, imprest fund allowance, advanced leave, overpayment of salary or other.
   c. I have no unsatisfied period of obligated service for travel or transportation to my first post of duty, to a new post of duty or for training.

2. I agree not to reveal to any person any classified information, information of a confidential nature, information for limited official use, tax information, sensitive tax information, or any other information that is for official use only, of which I have knowledge unless officially authorized to do so by appropriate officials of the Internal Revenue Service.

3. I have read the requirements pertaining to conflict of interest contained in Sec. 222.1 in the Handbook of Employee Responsibilities and Conduct (IRM 0735.1), and 0.735-21 in the Department of the Treasury, minimum standards of conduct booklet. I understand these requirements and agree to uphold them.

Signature *(Employee)* | Date

Remarks:

Form 5389 (3-75)

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Internal Revenue Service
memorandum

date: DEC 20 1979

to: All Employees

from: Director, Personnel Division

subject: Post Employment Conflicts of Interest

Under the provisions of 18 USC 207, Ethics in Government Act, employees must observe various restrictions in their post-employment activity.

In an effort to make employees aware immediately of their obligation to adhere to the provisions, the Post-Employment Conflict of Interest guidelines are printed on the reverse side of this memorandum. Future selectees should receive a copy of the guidelines prior to or along with final offers of employment.

These guidelines, which supersede IRM 0300.166 (Manual Transmittal 0300-50), have been incorporated in forthcoming Manual Transmittal 0300-77, presently being printed. The guidelines will also be printed as a separate document (Doc. No. 6603), and will be available to Personnel Offices through regular distribution channels.

APPENDIX II

POST-EMPLOYMENT CONFLICTS OF INTEREST

Purpose. To provide current and prospective employees with a summary of the conflict of interest provisions of 18 U.S.C. Section 207 (Ethics in Government Act) as amended by P.L. No. 96-28, 93 Stat 96 (1979). [Employees who left Government service prior to July 1, 1979, are subject to those provisions in effect prior to the Ethics in Government Act as amended.]

Background. Conflict of interest provisions attempt to prevent employees from dividing their loyalty between their employers and other parties, from disclosing confidences and secrets of their employers, from switching sides in a controversy, and from otherwise acting in an improper manner or in what appears to be an improper manner. The provisions of 18 U.S.C. Section 207 are "post employment" restrictions which prevent former employees from making unfair use of their prior positions and affiliations.

Depending on the extent to which a former Government employee dealt with a matter while in Government employ, he/she may be barred for one year, two years, or for life, from representing any party other than the Government with respect to that matter. There are four basic types of restrictions on post-employment activity.

1. **Lifetime Ban for Personal and Substantial Participation.** No former Government employee may represent any party before, or attempt to influence, the United States, in connection with any particular matter involving a specific party in which the employee participated personally and substantially as a Government employee.

2. **Two Year Ban for Matters Under Official Responsibility.** For a period of two years after leaving Government employment, no former employee may represent any party before, or attempt to influence, the United States, in connection with any particular matter involving a specific party, if the matter was actually pending under the employee's official responsibility within one year prior to the termination of such responsibility.

3. **Two Year Ban Against Senior Employee's Assisting In Representation by Being Personally Present Before the United States.** For a period of two years after leaving Government employment, no former Senior Employee, as designated pursuant to 18 U.S.C. Section 207(d), may, by personal presence at an appearance before a department, agency, court, or commission of the United States, aid, counsel, or assist in the representation of any party in connection with any particular matter involving a specific party if he/she participated personally and substantially in the matter while a Government employee.

A "Senior Employee" is an individual who is employed at a rate of pay fixed at the Executive Level or who is employed in a position which involves significant policymaking or supervisory responsibility, as designated by the Director of the Office of Government Ethics (OGE). However, only positions for which the basic rate of pay is equal to or greater than the basic rate of pay for GS-17 or positions which are established within the Senior Executive Service may be designated.

4. **One Year Ban on Senior Employee's Transactions With Former Agency.** For a period of one year after leaving Government employment, no former Senior Employee, as designated pursuant to 18 U.S.C. Section 207(d), may represent any party before, or attempt to influence, his/her former agency or any of its employees, in connection with any particular matter, whether or not involving a specific party, which is pending before the agency. For purposes of this "no-contact" provision, the Director, OGE has the authority to designate units within a department or agency as "separate agencies" Thus, it is possible that an employee would only be prohibited from contacting the division, branch, or other entity where he/she worked, and not the entire agency, if such entity is designated a "separate agency" by the Director, OGE.

Sanctions for Violating Post-Employment Restrictions. An employee who violates any of these provisions may be fined up to $10,000 or imprisoned for two years, or both. An employee may also be barred from practice before or contact with his/her former agency for up to five years.

APPENDIX III

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

APR 24 1981

Mr. Clifford I. Gould
Director, Federal Personnel and
Compensation Division
United States General Accounting Office
Washington, D. C. 20548

Dear Mr. Gould:

Your letter of March 26, 1981, asked the Director of the Office of Personnel Management, Donald J. Devine, to review and comment on the draft text of a proposed GAO report, "Federal Tax System Post-Employment Conflicts of Interest: A Potential Problem That Can Be Prevented." I am pleased to submit my response to you on behalf of Director Devine, the Office of Personnel Management and the Office of Government Ethics.

In general, I concur in the proposed report's recommendations that it would be useful to counsel with and provide more specific information to terminating employees. I also agree with the emphasis in title of the proposed report, which emphasizes that this is an inquiry into "a potential problem." But the study does not even attempt to come to grips with the critical question of whether this is a serious potential problem. The study falls short of defining the extent to which actual violations are occuring; if we knew this, the proposed report would have added greatly to the body of knowledge in the field and hence to the value of the study. It is neither unanticipated nor necessarily undesirable that people who serve in Justice and Treasury leave the government service for employment in the private sector in the area of their expertise, the tax system. In fact, it is arguable that the recruitment programs of these agencies are enhanced by this tendency and that positive benefits accrue in the administration of the tax laws if knowledgeable former Government officials are involved in private sector counseling. It does not dispose of the issue merely to indicate that such departures hold the possibility for post-employment violations.

Looking at the degree to which actual violations have occurred would also have required a more vigorous analysis of specific behavior versus specific statutory provisions than appears to have taken place in the study. For example, all of the people surveyed left government service prior to the effective date of the post employment provisions of the Ethics in Government Act. Thus, they were subject to the previously existing 18 U.S.C. §207, not the amended form of this statute that appears as Title V of the Ethics in Government Act, with its longer section 207(b)(i) ban and its section 207(c) one-year "cooling-off" period for Senior employees added as a response to so-called "revolving door" concerns. Some indication of whether the passage of the Act made any difference would have been a helpful addition to the study. In this regard, one only needs recall the air of turbulence surrounding the revision of 18 U.S.C. § 207, the plethora of press treatment, and then the later amendments to the revisions, to understand how these departing employees may have felt they lacked sufficient information about potential conflicts of interest.

Finally, when reviewing what agencies have or have not done to develop and implement programs responsive to the legal and regulatory framework we must keep in mind the balancing that occurs when limited resources are being allocated among specific and competing programmatic activities. Had the study concentrated more on the degree to which actual violations have taken place, it would have provided the agencies with a greater rationale for targeting additional resources. It seems reasonable to assume that time and difficulty factors precluded the GAO team from taking this further step. If that is the case for a limited study, one can easily see the difficulty that would be entailed in establishing permanent monitoring systems. In this regard, it is instructive to note that when Congress appears to have desired a monitoring system, e.g., the Department of Energy, it specifically has so stated in the law.

We appreciate the vote of confidence the proposed report gives to our Title IV regulations, which were issued on January 9, 1981. The proposed report, at page 8, supports "the need for prompt and effective implementation of these regulations...." (5 C.F.R. Part 738.) I would also note that our regulations of February 1, 1980 (5 C.F.R. Part 737) have a section on administrative enforcement proceedings (§ 737.27) under which both Justice and Treasury have issued implementing regulations (28 C.F.R. Part 45 and 31, C.F.R. Part 15 respectively).

Thank you for the opportunity to review your study and to provide these comments. I would have been pleased to have consulted with the study team during the course of the study had they chosen to do so. Had that taken place, I would have tried to steer them into some type of measurement of the seriousness of the problem along the lines indicated above.

Sincerely,

Jack Walter

J. Jackson Walter
Director

APPENDIX IV

18 U.S.C. 207

§ 207. Disqualification of former officers and employees; disqualification of partners of current officers and employees

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to—

(1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed; or

(b) Whoever, (i) having been so employed, within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) by personal presence at any formal or informal appearance before—

(1) any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) as to (i), which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or, as to (ii), in which he participated personally and substantially as an officer or employee; or

(c) Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year, having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

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shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(d)(1) Subsection (c) of this section shall apply to a person employed—

(A) at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority;

(B) on active duty as a commissioned officer of a uniformed service assigned to pay grade of O–9 or above as described in section 201 of title 37, United States Code; or

(C) in a position which involves significant decision-making or supervisory responsibility, as designated under this subparagraph by the Director of the Office of Government Ethics, in consultation with the department or agency concerned. Only positions which are not covered by subparagraphs (A) and (B) above, and for which the basic rate of pay is equal to or greater than the basic rate of pay for GS–17 of the General Schedule prescribed by section 5332 of title 5, United States Code, or positions which are established within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978, or positions of active duty commissioned officers of the uniformed services assigned to pay O–7 or O–8, as described in section 201 of title 37, United States Code, may be designated. As to persons in positions designated under this subparagraph, the Director may limit the restrictions of subsection (c) to permit a former officer or employee, who served in a separate agency or bureau within a department or agency, to make appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency, having separate and distinct subject matter jurisdiction, upon a determination by the Director that there exists no potential for use of undue influence or unfair advantage based on past government service. On an annual basis, the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his responsibilities under this paragraph.

(2) The prohibition of subsection (c) shall not apply to appearances, communications, or representation by a former officer or employee, who is—

(A) an elected official of a State or local government, or

(B) whose principal occupation or employment is with (i) an agency or instrumentality of a State or local government, (ii) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or

(iii) a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1954, and the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization.

(e) For the purposes of subsection (c), whenever the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency exercises functions which are distinct and separate from the remaining functions of the department or agency, the Director shall by rule designate such agency or bureau as a separate department or agency; except that such designation shall not apply to former heads of designated bureaus or agencies, or former officers and employees of the department or agency whose official responsibilities included supervision of said agency or bureau.

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(f) The prohibitions of subsections (a), (b), and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the department or agency concerned, or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.

(g) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States before any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest, and in which such officer or employee or special Government employee participates or has participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility, shall be fined not more than $5,000, or imprisoned for not more than one year, or both.

(h) Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury.

(i) The prohibition contained in subsection (c) shall not apply to appearances or communications by a former officer or employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits; nor shall the prohibition of that subsection prevent a former officer or employee from making or providing a statement, which is based on the former officer's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided for by law or regulation for witnesses.

(j) If the head of the department or agency in which the former officer or employee served finds, after notice and opportunity for a hearing, that such former officer or employee violated subsection (a), (b), or (c) of this section, such department or agency head may prohibit that person from making, on behalf of any other person (except the United States), any informal or formal appearance before, or, with the intent to influence, any oral or written communication to, such department or agency on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action. Such disciplinary action shall be subject to review in an appropriate United States district court. No later than six months after the effective date of this Act, departments and agencies shall, in consultation with the Director of the Office of Government Ethics, establish procedures to carry out this subsection.
As amended Pub.L. 95-521, Title V, § 501(a), Oct. 26, 1978, 92 Stat. 1864; Pub.L. 96-28, §§ 1, 2, June 22, 1979, 93 Stat. 76.

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APPENDIX V

Treasury Department Regulations Governing Practice Before The Internal Revenue Service

(a) *Definitions* For purposes of § 10.26. (1) "Assist" means to act in such a way as to advise, furnish information to or otherwise aid another person, directly of indirectly.

(2) "Government employee" is an officer or employee of the United States or any agency of the United States, including a "special government employee" as defined in 18 U.S.C. 202(a), or of the District of Columbia, or of any State, or a member of Congress or of any State legislature.

(3) "Member of a firm" is a sole practioner or an employee or associate thereof, or a partner, stockholder, associate, affiliate or employee of a partnership, joint venture, corporation, professional association or other affiliation of two or more practitioners who represent non-Government parties.

(4) "Practitioner" is an attorney, certified public accountant, enrolled agent or any other person authorized to practice before the Internal Revenue Service.

(5) "Official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action, with or without knowledge of the action.

(6) "Participate" or "participation" means substantial involvement as a Government employee by making decisions, or preparing or reviewing documents with or without the right to exercise a judgment of approval or disapproval, or participating in conferences or investigations, or rendering advice of a substantial nature.

(7) "Rule" includes Treasury Regulations, whether issued or under preparation for issuance as Notices of Proposed Rule Making or as Treasury Decisions, and revenue rulings and revenue procedures published in the Internal Revenue bulletin. "Rule" shall not include a "transaction" as defined in paragraph (a)(9) of this section.

(8) "Transaction" means any decision, determination, finding, letter ruling, technical advice, contract or approval or disapproval thereof, relating to a particular factual situation or situations involving a specific party or parties whose rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service, or other legal rights, are determined or immediately affected therein and to which the United States is a party or in which it has a direct and substantial interest, whether or not the same taxable periods are involved. "Transaction" does not include "rule" as defined in paragraph (a)(7) of this section.

(b) *General rules.* (1) No former Government employee shall, subsequent to his Government employment, represent anyone in any matter administered by the Internal Revenue Service if the representation would violate 18 U.S.C. 207 (a) or (b) of any other laws of the United States.

(2) No former Government employee who participated in a transaction shall, subsequent to his Government employment, represent or knowingly assist, in that transaction, any person who is or was a specific party to that transaction.

(3) No former Government employee who within a period of one year prior to the termination of his Government employment had official responsibility for a transaction shall, within one year after his Government employment is ended, represent or knowingly assist in that transaction any person who is or was a specific party to that transaction.

(4) No former Government employee shall, within one year after his Government employment is ended, appear before any employee of the Treasury Department in connection with the publication, withdrawal, amendment, modification, or interpretation of a rule in the development of which the former Government employee participated or for which, within a period of one year prior to the termination of his Government employment, he had official responsibility. However, this subparagraph does not preclude such former employee for appearing on his own behalf or from representing a taxpayer before the Internal Revenue Service in connection with a transaction involving the application or interpretation of such a rule with respect to that transaction: *Provided*, That such former employee shall not utilize or disclose any confidential information acquired by the former employee in the development of the rule, and shall not contend that the rule is invalid or illegal. In addition, this subparagraph does not preclude such former employee from otherwise advising or acting for any person.

(c) *Firm representation.* (1) No member of a firm of which a former Government employee is a member may represent or knowingly assist a person who was or is a specific party in any transaction with respect to which the restrictions of paragraph (b)(1) (other than 18 U.S.C. 207 (b)) or (b)(2) of this section apply to the former Government employee, in that transaction, unless:

(i) No member of the firm who had knowledge of the participation by the Government employee in the transaction initiated discussions with the Government employee concerning his becoming a member of the firm until his Government employment is ended or six months after the termination of his participation in the transaction, whichever is earlier;

(ii) The former Government employee did not initiate any discussions concerning becoming a member of the firm while participating in the transaction or, if such discussions were initiated, they conformed with the requirements of 18 U.S.C. 208(b); and

(iii) The firm isolates the former Government employee in such a way that he does not assist in the representation.

(2) No member of a firm of which a former Government employee is a member may represent or knowingly assist a person who was or is a specific party in any transaction with respect to which the restrictions of paragraph (b)(3) of this section apply to the former employee, in that transaction unless the firm isolates the former Government employee in such a way that he does not assist in the representation.

(3) When isolation of the former Government employee is required under paragraphs (c)(1) or (c)(2) of this section, a statement affirming the fact of such isolation shall be executed under oath by the former Government employee and by a member of the firm acting on behalf of the firm, and shall be filed with the Director of Practice and in such other place and in the manner prescribed by regulation. This statement shall clearly identify the firm, the former Government employee, and the transaction or transactions requiring such isolation.

(d) *Pending representation.* Practice by former Government employees, their partners and associates with respect to representation in specific matters where actual representation commenced before publication of this regulation is governed by the regulations set forth in the June 1972 amendments to the regulations of this part (published at 37 FR 11676): *Provided*, That the burden of showing that representation commenced before publication is with the former Government employees, their partners and associates.

[42 FR 38352, July 28, 1977]

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APPENDIX VI

The American Bar Association's Code Of Professional Responsibility And Judicial Conduct, As Amended August 1977

Canon 5: A Lawyer Should Exercise Independent Professional Judgement on Behalf of a Client

Disciplinary Rule 5-105(D) - If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

Canon 9: A Lawyer Should Avoid Even the Appearance of Professional Impropriety

Disciplinary Rule 9-101(B) - A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

Separation Statistics And Questionnaire Methodology

This appendix explains how we developed the statistics on the movement of tax administration employees from Government to private sector employment, selected the positions for which this information was developed, selected the questionnaire recipients, and analyzed the returned questionnaires.

MOVEMENT STATISTICS

The Departments of Justice and the Treasury, including the Internal Revenue Service, had summary information on employee separations but did not have statistics on the number of employees who left for private sector jobs and, thus, could be affected by the post-Federal employment restrictions. To develop this information, we reviewed the agencies' chronological files of Standard Forms 50, "Notification of Personnel Action," to identify those indicating separation from professional positions at the Justice Department's Tax Division and the Treasury Department's Office of Tax Policy and for selected professional positions at the Internal Revenue Service.

The Justice Department positions were all heads of organizational units within the Tax Division and trial attorneys. The Treasury Department positions included heads of organizational units within the Office of Tax Policy, attorney-advisors, economists, mathematicians, and accountants. We, however, dropped the economist, mathematician, and accountant positions from our review when we found that there were few separations from these positions.

In selecting the IRS positions to include in our review, we chose those which we believed were most susceptible to post-Federal employment conflicts of interest. Our selection was primarily based on our analysis of attrition rates and general position descriptions and our discussions with IRS officials. It should be noted that the positions we selected are not the only ones which are affected by the post-Federal employment restrictions. The positions are listed in appendix VIII.

We then reviewed all of the Standard Forms 50 which showed a separation for the selected positions to determine the reason for separation and the length of Government service. We categorized the reasons for separation as (1) death, (2) retirement, (3) transfers to other Government organizations, (4) return to school, (5) private sector jobs, (6) miscellaneous reasons, and (7) unknown. We determined the length of Government service by computing the time between the service computation date and the effective date of separation.

SELECTION OF QUESTIONNAIRE RECIPIENTS

To determine how effectively the agencies were communicating the post-Federal employment restrictions to their employees and how many former employees were working on Federal tax-related matters, we mailed questionnaires to individuals who left the selected positions during fiscal year 1978 for reasons which we had categorized as private sector jobs, miscellaneous, or unknown. Although 169 employees had left the selected positions in fiscal year 1978, we could not obtain addresses for 9 of them. For former employees who did not leave forwarding addresses with their agencies, we checked Washington, D.C., and Chicago metropolitan area telephone and city directories and contacted professional associations and Martindale-Hubbell, Inc., which publishes a law directory, for the addresses of former employees who may have been on their membership lists.

Analysis of returned questionnaires

A total of 160 questionnaires were sent. Of the 160, 35 were returned to us undelivered and we were unable to obtain another address, leaving a total of 125 outstanding. To encourage questionnaire recipients to respond, we mailed two followup letters and a mailgram. Of the 125 questionnaires outstanding, 94 were returned, for a response rate of 75 percent.

The questionnaire results presented in this report are based on 83 of the 94 questionnaires returned to us. We did not include 11 of the returned questionnaires in our tabulations because 7 of the respondents indicated that they had not left the Government in fiscal year 1978, 3 respondents returned the questionnaire unanswered, and 1 was deceased.

We reviewed each returned questionnaire for completeness and to determine if the respondent's answers indicated an understanding of the question. We also reviewed optional written comments to gain a better understanding of the respondent's opinions. We then keypunched the responses to create a computerized data base. We verified the data elements back to the questionnaires and corrected any errors.

We compiled the questionnaire results by counting the frequency of responses to each question. Some data elements were cross-tabulated.

Internal Revenue Service Positions Reviewed

National Office	Positions
Chief Counsel:	
Immediate office	All professional positions
Criminal Tax, Employee Plans and Exempt Organizations, General Litigation, Interpretative, Legislation and Regulations, Tax Litigation	Directors, assistant directors branch chiefs, assistant branch chiefs, attorneys, professional assistants
Assistant Commissioner (Technical):	
Immediate office	All professional positions
Individual and Corporate Tax Divisions	Division directors, assistant directors, staff assistant, branch section and group chiefs, project leaders, project analysts, project specialists, technical advisors, tax law specialists, revenue agents
Assistant Commissioner (Employee Plans and Exempt Organizations):	
Immediate office	All professional positions
Employee Plans and Exempt Organizations Divisions	Division directors, assistant directors, branch chiefs, assistant branch chiefs, tax law specialists, revenue agents, exempt organization specialists
Assistant Commissioner (Compliance):	
Immediate office	All professional positions
Examination Division	Director; assistant director; program, group, and case managers; attorneys; tax law specialist; revenue agents

Internal Revenue Service Positions Reviewed

Chicago District Office

Employee Plans and Exempt Organizations and Examination Divisions	Division chiefs, assistant division chief, group managers, group supervisors, assistant program managers, branch chiefs, attorneys, revenue agents, case managers, employee plans specialists, exempt organization specialists

APPENDIX IX

U.S. GENERAL ACCOUNTING OFFICE

STUDY OF THE ADMINISTRATION OF POST-FEDERAL EMPLOYMENT LAWS AND REGULATIONS IN THE FEDERAL TAX SYSTEM

INSTRUCTIONS

The purpose of this questionnaire is to help us determine whether agency procedures are adequate to prevent violations of post-Federal employment restrictions in the Federal tax system.

A former Federal employee is prohibited from participating in matters in which he/she had been involved as a Federal employee. As provided in 18 U.S.C. 207, the length of the restriction depends on the extent of the former employee's involvement in the matter. A permanent ban exists against representing parties in matters in which the former employee had personally and substantially participated. A one to two year ban exists against representing parties in matters that had been pending within the individual's area of official responsibility.

Please answer this questionnaire in terms of the agency and position which you left in fiscal year 1978 (October 1, 1977 - September 30, 1978). If you held more than one of these positions during fiscal year 1978, please answer in terms of your last position. When you have completed the questionnaire, return it in the postage-paid envelope.

Thank you for your help.

A. Background Information

1. Did you leave the Federal Government in FY78?

1.	/87/ a/	Yes (continue)
2.	/7/	No (Go no further; please return this form in the envelope provided.)
	94	Total

2. For which Federal agency did you work? (Check one.)

1.	/11/	Department of Justice: Tax Division
2.	/5/	Department of the Treasury: Office of Tax Policy
		Internal Revenue Service:
3.	/16/	Chief Counsel
4.	/19/	Technical
5.	/10/	Employee Plans and Exempt Organizations
6.	/22/	Examination (Audit)
	83	Total

3. How many years had you worked for this Federal organization? (Check one.)

1.	/11/	Less than one
2.	/31/	One but less than four
3.	/36/	Four but less than seven
4.	/5/	Seven or more
	83	Total

4. What was your last job title? (Check one.)

1.	/35/	Attorney
2.	/27/	Tax law specialist
3.	/17/	Internal Revenue agent
4.	/4/	Other (specify) Officials (4)
	93	Total

B. Information Your Former Agency Provided on Post-Employment Laws and Regulations

5. Did your former agency give you information on post-employment laws and regulations?

1.	/44/	Yes (continue)
2.	/38/	No (Go to question 14.)
	1	Don't remember
	83	Total

a/ Three respondents returned the questionnaire unanswered and one was deceased.

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NOTE: Total possible respondents to questions 6 through 13 is 44; not all respondents answered all questions.

6. Which of the following post-employment provisions did your agency inform you of? (Check all that apply.)

1. /29/ The statutory post-Federal employment restrictions (18 U.S.C. 207)
2. /29/ The regulations governing practice before the Internal Revenue Service (Treasury Department Circular No. 230)
3. /17/ The regulations governing practice before your former agency
4. / 4/ The American Bar Association's Code of Professional Responsibility

Total Respondents - 39

7. Did your former agency provide specific information in the following areas? (Check one for each line.)

	Yes (1)	No (2)	Don't remember (3)	Total
1. The types of duties that may (may not) be performed because of the responsibilities of your former position	26	7	10	43
2. The specific case-related matters in which a former employee may (may not) participate because of his/her former Government responsibilities	28	8	7	43
3. The procedures to follow when a former employee is not sure whether he/she can participate in a tax matter	8	15	20	43
4. The penalties for violations of the laws and regulations	16	8	18	42
5. The procedures to resolve post-employment conflicts of interest	7	17	19	43
6. The procedures to follow when negotiating for employment	4	30	9	43

8. In your opinion, generally how adequate or inadequate was the information your agency provided regarding post-employment provisions? (Check one.)

1. / 3/ Very adequate
2. /21/ Generally adequate
3. /11/ Neither adequate nor inadequate
4. / 5/ Generally inadequate
5. / 2/ Very inadequate

42 Total

9. Which of the following methods did your former agency use to provide information on post-Federal employment restrictions? (Check all that apply.)

1. / 5/ Provided references to the restrictions
2. /28/ Provided written information on the restrictions
3. / 7/ Discussed the restrictions during training sessions or seminars
4. / 6/ Provided individual counseling on the restrictions
5. / 2/ Don't remember
6. / 3/ Other (specify) Initiated talk with supervisor; general staff discussions (2) Total Respondents - 43

10. In your opinion, generally how adequate or inadequate were the methods employed by your former agency to provide information on post-Federal employment? (Check one.)

1. / 2/ Very adequate
2. /24/ Generally adequate
3. / 7/ Neither adequate nor inadequate
4. / 5/ Generally inadequate
5. / 2/ Very inadequate

40 Total

11. When did your agency provide information on the post-Federal employment restrictions? (Check as many as apply.)

1. / 2/ Before employment
2. / 9/ At orientation
3. /32/ Periodically during employment
4. /—/ When they learned an employee was negotiating for other employment
5. /32/ When terminating employment
6. / 4/ Don't remember

Total Respondents - 43

12. Consider the times at which your agency provided information on the post-Federal employment restrictions. In your opinion, was this information provided at times to insure usefulness?

1. / 6/ Definitely yes
2. /21/ Generally yes
3. /10/ Uncertain
4. / 5/ Generally no
5. /—/ Definitely no

42 Total

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13. If you were facing a potential post-employment conflict-of-interest situation, how helpful would you find your former agency's rules in the following areas? (Check one for each line.)

	Very helpful 1	Somewhat helpful 2	As helpful as not 3	Not very helpful 4	Not helpful 5	Total
1. Determining if the same tax matter is involved	6	13	9	6	6	40
2. Determining if your Government participation in the matter was personal and substantial	5	13	8	7	7	40
3. Determining if you had official responsibility for the matter	5	12	10	9	5	40
4. Determining if any participation in the matter is permissible	2	14	8	11	5	40
5. Determining if your associates can participate in matters which you cannot	4	7	11	10	6	38
6. Determining if you can participate in the matter before another agency or the courts	2	8	7	15	7	39

C. Information on Your Employment After Leaving the Government

14. Which of the following best describes your current employment? (Check one.)

1. /44/ Law firm
2. /12/ Accounting firm
3. /5/ Other tax practitioner
4. /9/ Other business (manufacturer, retailer, service)
5. /8/ Government (Federal, state or local)
6. /5/ Other (specify) Education, (4); trade association (1)

83 Total

15. Are you currently authorized to practice before the IRS? (Check all that apply.)

1. /64/ Yes, as an attorney
2. /15/ Yes, as a CPA
3. /3/ Yes, as an enrolled agent
4. /7/ No

16. Which of the following tax-related activities does your employment involve? (Check as many as apply.)

1. /68/ Providing advice concerning the interpretation or application of Federal tax laws, regulations, or procedures
2. /33/ Preparing or helping to prepare Federal tax returns
3. /56/ Representing parties before the Internal Revenue Service
4. /18/ Representing parties before the Justice Department
5. /35/ Representing parties before the Tax Court
6. /27/ Representing parties in tax cases before other Federal courts
7. /32/ Commenting on revenue rulings, regulations or procedures
8. /9/ Drafting tax legislation
9. /2/ Other Federal tax-related activities (specify) Criminal tax; advisory committee work
10. /11/ None

17. About what percentage of your work involves Federal tax matters? (Check one.)

1. /17/ Very little or none (less than 20%)
2. /8/ Little (20% to 40%)
3. /13/ Moderate (40% to 60%)
4. /11/ Considerable (60% to 80%)
5. /34/ Very great (over 80%)

83 Total

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D. Applicability of Post-Federal Employment Restrictions Within the Tax System

Please answer the following questions about your experience in the private sector, since you left your government position.

18. How many times has a potential conflict-of-interest situation resulted from your personal and substantial participation in a matter as a government employee? (Check one.)

1.	/68/	None
2.	/15/	1-3
3.	/0/	4-6
4.	/0/	7-9
5.	/0/	10 or more
	83	Total

19. How many times has a potential conflict-of-interest situation resulted from your official government responsibility for a matter? (Check one.)

1.	/75/	None
2.	/7/	1-3
3.	/0/	4-6
4.	/0/	7-9
5.	/1/	10 or more
	83	Total

20. How many of the above potential conflict-of-interest situations resulted from cases your firm was handling prior to your joining the firm? (Check one.)

1.	/74/	None
2.	/9/	1-3
3.	/0/	4-6
4.	/0/	7-9
5.	/0/	10 or more
	83	Total

21. How many of the above potential conflict-of-interest situations resulted from cases you or your new firm were asked to handle subsequent to your joining the firm? (Check one.)

1.	/75/	None
2.	/7/	1-3
3.	/0/	4-6
4.	/1/	7-9
5.	/0/	10 or more
	83	Total

22. In resolving these potential conflict-of-interest situations, did you most often (Check one):

1.	/13/	Resolve the situation independently, without your former agency's help
2.	/2/	Ask your former agency's opinion on the situation
3.	/0/	Other (specify) _____
4.	/68/	Not applicable (no potential conflict-of-interest situations)
	83	Total

E. Comments

23. Please use the space below to comment on any questions, or comment on items that we did not ask, but you believe are pertinent to the Federal tax system aspects of post-Federal employment laws and regulations.

See next page.

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Former Employee Comments

Improvements not needed	Number of comments
Common knowledge that restrictions exist	4
Policing not necessary because risks to individuals are so great	1
Additional information not necessary because conflicts of interest are obvious	1
Government should not dictate where individuals can work	1
Improvements needed	
Emphasized that postemployment information was not provided or had to be requested	4
Regulations are ambiguous, subject to different interpretations, and have to be read carefully	3
Very important area: vast improvements needed	3
Other	
Described potential conflict-of-interest situation or stated why no conflicts of interest had occurred	9
Retirement seminars should cover postemployment laws and regulations	1
Information should be provided by organizational unit, not personnel office	1

Number and Percent of Questionnaire Respondents Employed in Private Tax Practice

Agency	Number of respondents	Employed in tax work	
		No.	Percent
Justice Department:			
Tax Division	11	11	100
Treasury Department:			
Office of Tax Policy	5	5	100
IRS Chief Counsel	16	14	88
IRS:			
Technical Division	19	17	89
Employee Plans and Exempt Organizations Division	10	7	70
Examination Division	22	17	77
Total	83	71	86

Number and Percent of Former Employees Employed in Private Tax Practice but Not Informed of Post-Federal Employment Restrictions

Agency	Number employed in tax work	Not informed of restrictions	
		No.	Percent
Justice Department:			
Tax Division	11	5	45
Treasury Department:			
Office of Tax Policy	5	1	20
IRS Chief Counsel	14	3	21
IRS:			
Technical Division	17	12	71
Employee Plans and Exempt Organizations Division	7	4	57
Examination Division	17	6	35
Total	71	31	44

Number and Percent of Former Employees Not Informed of Postemployment Restrictions That Apply to Their Federal Tax Activities

Postemployment activities subject to restrictions	Former employees involved in activity	Former employees not informed of Statute		Treasury regulations		ABA Code	
		No.	Percent	No.	Percent	No.	Percent
Representing parties at the:							
Internal Revenue Service	56	32	57	30	54	NA	NA
Justice Department	18	8	44	NA	NA	16	89
Tax Court	35	22	63	NA	NA	34	97
Other Federal courts	26	13	50	NA	NA	24	92
Commenting on revenue rulings, regulations or procedures	32	NA	NA	20	63	NA	NA

NA - Not Applicable

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(268064)

Employee Separations For Private Sector Jobs Which May Involve Federal Tax Practice From January 1, 1976 to September 30, 1978

Agency	Employees as of 9/30/78 (note a)	Employee separations									Average service (years)
			Non-tax related (note b)		Possible tax-related private sector jobs				Other (note c)		
					Total		Law & acct. firms				
		Total	No.	Percent	No.	Percent	No.	Percent	No.	Percent	
Department of Justice:											
Tax Division	250	72	24	33	48	67	37	51	11	15	4.5
Department of the Treasury:											
Office of Tax Policy	35	26	1	4	25	96	19	73	6	23	2.0
Chief Counsel	235	113	35	31	78	69	49	43	29	26	3.8
IRS national office:											
Technical Division	360	99	34	34	65	66	32	32	33	33	3.5
Employee Plans and Exempt Organizations Division	264	73	34	47	39	53	12	16	27	37	3.2
Examination Division	108	20	17	85	3	15	-	-	3	15	6.7
IRS Chicago District Office:											
Employee Plans and Exempt Organization Division	46	18	7	39	11	61	1	6	10	56	3.5
Examination Division	595	235	71	30	164	70	44	19	120	51	3.2
Total	1,893	656	223	34	433	66	194	30	239	36	3.5

a/See appendix VIII for positions included.
b/Includes retirements, transfers to other Federal agencies, and returns to school.
c/Includes employees who did not give a reason for separation.

APPENDIX X

BEST DOCUMENT AVAILABLE